JUL 1M 1969

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 86

MELVIN MORALES,

Petitioner,

vs.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the New York State Court of Appeals (a certified copy of which is annexed to the certified record) is reported at 22 N.Y.2d 55, 290 N.Y.S.2d 898, 238 N.E.2d 307. The opinion of the trial court determining the voluntariness of the confessions herein appears at pages 238-243 of the certified record.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on May 15, 1968. The remittitur was amended on June 6, 1968. The petition for a writ of certiorari was filed on August 10, 1968 and was granted on April 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1257. Pursuant to the requirement of 28 U.S.C. §1257 and Rule 23(1)(f) of this Court, the federal questions were timely and properly raised, as shown by the following passages from the opinion below, 22 N.Y.2d 55, 290 N.Y.S.2d 898, 238 N.E.2d 307, and the decision amending the remittitur, 22 N.Y.2d 753, 292 N.Y.S.2d 130, 239 N.E.2d 221:

> "On this appeal defendant contends that his confessions should have been suppressed because they were evidence obtained as a result of an unreasonable seizure proscribed by the Fourth Amendment . . . we conclude that defendant's temporary detention for questioning represented a reasonable exercise of the police power." 22 N.Y.2d at 58-59, 290 N.Y.S.2d at 902, 238 N.E.2d at 310.
>
> "Upon the appeal herein, there were presented and necessarily passed upon the following questions under the Constitution of the United States. . . . Defendant argued that certain confessions admitted on the trial should have been excluded upon the ground that these confessions were obtained during his unlawful detention, and upon the further ground that the confessions were not shown to have been voluntary beyond a reasonable doubt. The Court of Appeals held that defendant's constitutional rights were not violated." 22 N.Y.2d 753-754, 292 N.Y.S.2d 130, 131, 239 N.E.2d 221.

Questions Presented

1. Whether the admission into evidence of petitioner's confessions given immediately after being taken to the police station violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourteenth, upon the ground that the confessions were the product of an unlawful seizure of the petitioner's person by the New York City Police.

2. Whether the admission into evidence of petitioner's confessions violated petitioner's rights under the Fifth and Sixth Amendments made applicable to the States by the Fourteenth and also violated the due process clause of the Fourteenth upon the ground that the confessions were involuntary because taken from a known drug addict being held incommunicado and subjected to a prolonged interrogation without having been fully advised of his right to counsel.

Constitutional Provisions Involved

United States Constitution

Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV: Section 1. All persons born or naturalized in the United States, and sub-

ject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

At about three o'clock in the morning on October 4, 1964 Mr. and Mrs. Lionel Wales, whose apartment is on the eleventh floor at 700 East 156th Street, were entertaining Mr. and Mrs. Dudley Carr and family (R. 289, 319).* Suddenly, they heard a woman's screams (R. 290, 319). Messrs. Wales and Carr ran into the hall to investigate (R. 319). They heard running footsteps, and the slamming or closing of a door (R. 321-322). Mr. Carr went to the elevator and pushed the button; when the elevator arrived, he looked in and saw a woman standing there, bleeding from the face (R. 320). Mr. Carr opened the elevator door, the woman staggered out, and Wales and Carr helped her into the hallway (R. 320-321). An ambulance attendant pronounced Mrs. Addie Brown dead at about 3:30 A.M. on October 4, 1964 (R. 352-353). A subsequent autopsy established that death was the result of multiple stab wounds (R. 254).

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* Unless otherwise indicated, numbers in parentheses refer to pages in the printed record in the Appellate Division of the New York Supreme Court.

Approximately one week later, or on or about October 11, 1964 the police rounded up and questioned known narcotics addicts in the neighborhood (R. 732-733, 394-395, 409). The police were informed that the petitioner, known to Detectives Carroll and Ferguson as an addict, had not been seen about since the killing (R. 362, 731-733). The police made several fruitless attempts to contact the petitioner through his mother (R. 361-363, 444-445, 462).

On October 13, 1964 Detectives Daum and Carroll followed Mrs. Morales from her house to, and "staked out", her beauty parlor (R. 364-365, 445-446). At about 8:00 P.M. the petitioner arrived by taxicab and was immediately taken into custody (R. 365-366). Detective Daum physically barred Mrs. Morales from speaking to her son (R. 125-126, 240, 817-819). The detective told Mrs. Morales that they would hold her son only for an hour or so (R. 123, 240, 818). According to Detective Daum, petitioner was not free to go when he was picked up (R. 463). Petitioner and the two detectives drove to the 42nd Precinct in the Bronx. They arrived at 8:30 P.M. and went into the lieutenant's office (R. 178, 365-366, 384-385, 448).

At this point, the testimony offered in the trial diverges. The police said that petitioner confessed almost immediately to Detective Carroll; thereafter reiterated his confession several times; and finally went to the scene and re-enacted the crime. Petitioner, on the other hand, said that his confessions were the product of threats, physical abuses and his illness from lack of drugs.

The Police Version:

Upon arriving at the station, petitioner encountered Detective Ferguson, a long-time acquaintance (R. 721-722). Petitioner assured Ferguson that he was innocent (R. 722,

735-736) and Ferguson left to check on petitioner's story that he was at his mother's house on the night of the murder (R. 723-724). Carroll went out to get coffee and cake (R. 449). Daum told the petitioner why he was being questioned; that he could remain silent; that he could have a lawyer at any time; that any answers he gave would be held against him (R. 449). Petitioner replied "I would rather talk to Detective Carroll" (R. 449). Upon Carroll's return, petitioner said, "You know, Carroll, I can't take a beating" (R. 366). Carroll told petitioner not to worry, to stop "making alibis", "building crutches" and "fences to hide behind". Carroll told petitioner that he could not lie to God (R. 367). After a few like remarks the petitioner said he would tell Carroll "exactly what happened" (R. 367). Thereupon, at about 8:45 P.M. (R. 366), petitioner told Carroll that on the morning in question he was sitting on a bench located in front of 700 East 156th Street; that he was feeling ill from lack of narcotics; that he saw a woman enter the building; that he followed her into the elevator; that he attempted to snatch her pocketbook; that when she resisted he began stabbing her with his knife; that he fled from the building, discarding knife and purse along the way (R. 367-368). Petitioner further stated that he purchased narcotics and returned home (R. 368). Carroll's notes of this confession were admitted as Defendant's Exhibit A (R. 1326).

After this confession to Carroll, Daum re-entered the room (R. 368, 450). Both Detectives, in substance, advised petitioner that he would have to repeat his story several more times that evening and that it would be in his own interest to reduce his story to written form, so no one could change it (R. 368-369, 451). Petitioner did so, asking Car-

roll how to spell certain words (R. 370, 451; People's Exhs. 8 and 8A). Thereafter, petitioner supplied some minor additional details of the crime to Carroll (R. 372-373) and repeated his confession several more times, including oral confessions to Detectives Ferguson, Golly and Durkin and a question and answer session, stenographically recorded, with assistant district attorney Rotker at 1:00 A.M. on October 14, 1964 (R. 494-500; 589-597; 671-677; 724-725). After making these confessions petitioner was taken to the scene, where he re-enacted the crime (R. 503-504, 599-600).

Detectives subsequently recovered the suit petitioner was wearing on the night in question. Police laboratory tests found no blood on the suit (R. 717), and an employee of the drycleaning establishment from which the suit was taken said that when the suit was brought in on October 5, 1964, she had seen no blood on it (R. 719). Tests for blood stains run on petitioner's rain coat proved negative (R. 717).

Petitioner's Version:

Petitioner stated that he was subjected to various forms of verbal and physical abuse from the time he was picked up by Detectives Daum and Carroll about 7:30-8:00 P.M. on October 13 (R. 913-915, 929); that he continued to protest his innocence, while being threatened and beaten (R. 917-920); that the effects of his withdrawal pains, and the harassment of the officers caused him to write out a statement (People's Exhs. 8 and 8A) dictated to him by Detective Carroll (R. 917-923, 929, 936). Petitioner denied that he had ever committed the murder of Addie Brown (R. 952-953); and stated that if he needed money, there was money to be had in his mother's apartment (R. 1034-1036).

Both the police witnesses and the petitioner agree that sometime after the "re-enactment" of the crime, around 4:00 A.M. on the morning of October 14, 1964, the petitioner was taken to the emergency room of Morrisania Hospital and given an injection of Sparine, apparently a standard treatment for the symptoms of narcotic withdrawal (R. 1089-1094; 1050-1051; 947-948).

The defense also offered the testimony of members of petitioner's family tending to substantiate his story that he was in his mother's apartment from 11:00 P.M. October 3, 1964 through 6:00 A.M. on October 4th.

A pretrial hearing was held in the Supreme Court, Bronx County, before Mr. Justice Gellinoff, who determined that the confessions were voluntary and that there was no evidence of police brutality (R. 238-243). Aside from the above evidence, the only other proof remotely relevant to connecting petitioner to the crime came out of the mouth of one Everett Roberts, whose value as a witness was so demolished on cross examination that the prosecutor himself moved to say in summation: "I don't put too much stock in the little boy that was called as a witness that had this crime being committed in October, November or December" (R. 1192).

Petitioner was convicted of the crime of murder in the first degree, felony murder, after a trial before Gellinoff, J., and a jury in the Supreme Court, Bronx County, New York, and is presently serving a sentence of life imprisonment in Clinton Prison, Dannemora, New York. His conviction was affirmed by the Appellate Division of the New York State Supreme Court, First Department (27 A.D.2d 904, 280 N.Y.S.2d 520) and by the Court of Appeals of

the State of New York (22 N.Y.2d 55, 290 N.Y.S.2d 898, 238 N.E.2d 307).

Summary of Argument

The detention of petitioner was a seizure within the meaning of the Fourth Amendment, which is applicable to the states via the Fourteenth. On the authority of recent decisions of this Court, a seizure like this, having all the external indicia of a formal "arrest", i.e., removal of a citizen from the street by the police at a time and to a place selected by the police, must, to be a reasonable seizure, be founded upon probable cause or be pursuant to a warrant based on probable cause. The police had neither probable cause nor a warrant; therefore the seizure of the petitioner upon suspicion was unreasonable. The confessions obtained shortly after the unreasonable seizure should be held to be inadmissible at trial on one of two grounds: (a) exclusion of the confessions will serve to deter police in the future from making similar seizures; or (b) the exclusionary rule bars the confessions as "fruit of the poisonous tree" unpurged of the primary taint of the initial illegal seizure. Finally, the record does not support a finding that the confessions were voluntary. If this Court finds the confessions inadmissible on any of the above grounds, the conviction founded thereon is violative of due process and must be reversed.

ARGUMENT

I.

The Seizure of Petitioner by the New York City Police Violated Applicable Fourth Amendment Standards.

This case directly presents the question reserved in *Terry* v. *Ohio*, 392 U.S. 1, 19 n. 16: "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or investigation." Thus, this Court is once again faced with the task of applying applicable standards under the Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Regardless of the label attached to describe what happened to Morales, be it "arrest", "stop", or "detention", Fourth Amendment standards apply. *Terry* v. *Ohio, supra,* 391 U.S. at 19; *Davis* v. *Mississippi,* —— U.S. ——, ——, 89 S.Ct. 1394, 1397. In keeping with the outline of the *Terry* opinion, the ultimate conclusion about the reasonableness of the conduct of Detectives Daum and Carroll lies in balancing the governmental interests involved against the nature and quality of the intrusion. 392 U.S. at 20-21. Although the New York State Court of Appeals, writing prior to *Terry,* did in fact go through the mechanics of the balancing process, our point is that the Court misread the scales.

To cull from *Terry* once more, the crux of this case is whether there was justification for the invasion of Morales' right to be free from a seizure of his person. 392 U.S. at 23. Put another way, "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" 392 U.S. at 22. What will permit the intrusion upon the personal security of any citizen when that intrusion takes the form of "the harassment and ignominy incident to involuntary detention"? *Davis* v. *Mississippi*, —— U.S. ——, ——, 89 S.Ct. 1394, 1397. What must the police have to exercise the penultimate act of official control over our citizenry?

For a seizure like that in the present case, the Fourth Amendment requires the police action be based on the same criteria as an "arrest". In *Davis* v. *Mississippi, supra*, the Court clearly indicates that the taking of fingerprints by the police is permissible only if their access to the individual is founded on judicial authorization or a detention founded upon probable cause. If the taking of John Davis' fingerprints on December 3, 1965 during a period of detention neither voluntary nor predicated upon probable cause does not square with the requirements of the Fourth Amendment, then the taking of Morales' person into custody for purposes of interrogation also violated the Fourth Amendment unless there was probable cause. And of probable cause there was none. The police lacked facts that would indicate to a man of reasonable caution that the petitioner was the guilty party. See *Terry* v. *Ohio*, 392 U.S. 1, 22; *Beck* v. *Ohio*, 379 U.S. 89, 97; *Carroll* v. *United States*, 267 U.S. 132, 161. This being so, it follows that Melvin Morales was unreasonably detained within the

meaning of the Fourth Amendment. *Davis* v. *Mississippi, supra.*

The dearth of information upon which the police acted is amply revealed by the record. To illustrate:

According to Detective Ferguson, who had known Melvin Morales "since he was a little boy" (R. 731), on or about October 11 or 12 the police "rounded up several narcotic users; we call them junkies, in the vicinity. And we had conversations with them. * * * As a result of our conversations wih [sic] these junkies, we then concentrated our efforts in an effort to locate Morales" (R. 732-733). Morales' name was one of many mentioned in connection with the investigation (R. 69). The police concentration on finding Morales coincides with the junky roundup (R. 47, 459, 812). The information yielded from the roundup is patently the prime motive behind the seizure of Morales. Detective Carroll testified:

> "During the course of the investigation it was ascertained that the defendant Morales had been a constant and habitual frequenter of the area and could have been seen at almost any time of the day or night in the area, and that shortly after this thing occurred, that he had absented himself therefrom. And it appeared to us in our investigation and in our thinking, that it would be proper and pertinent to find him and to question him" (R. 394-395). * * * "I became aware of this information about two days prior to apprehending the defendant" (R. 409).

And if that is not enough to show that the seizure of Morales was the end product of the barest guesswork, consider the following brief exchanges:

First, on the preliminary hearing to determine voluntariness, this passage comes during trial counsel's cross examination of Detective Carroll:

> Q. All right. Was he a suspect in connection with the homicide that occurred on October 4th? * * *.
>
> The Court: Explain to him what you mean by the word "suspect." * * * If I were a cop on a homicide investigation, everybody is a suspect. I'd rule out nobody. Everybody is a suspect in my mind.
>
> Now, is that what you mean?
>
> Q. Did you have any reason in your mind at the time to believe that this defendant was connected either directly or indirectly with that homicide which occurred on October 4, 1964? Yes or no? A. That's what I wanted to question him about. I concur with the Judge. Everybody is a suspect.
>
> Q. All right. Now, did you have any idea in your mind, sir, that this defendant was possibly connected in one way or other with that homicide? Yes or no? A. Not particularly (R. 84-85).

Second, on the main trial during cross examination Carroll said:

> Well, at the time that I apprehended him in front of the beauty parlor, and as he alighted from the cab at that point, I didn't have anything against him that would definitely pin him to the homicide. It was only the subsequent questions thereto that brought out what it brought out (R. 404).

And on the very next page of the record:

> Q. All right, did you suspect he was the killer? Thank you, sir. A. Truthfully, no, I was dubious.

> Q. Fine, you were dubious. So now, having been dubious, were you also dubious when you arrived at the police station the first time before you interrogated this defendant? A. I was still dubious (R. 405).

In anticipation of respondent's argument that in spite of this admitted lack of probable cause, the seizure of Morales was reasonable, Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 39-40, *Morales* v. *New York,* No. 668 Misc. O.T. 1968, we turn to an elaboration why none of the factors leading to the Court of Appeals determination of reasonableness supports that conclusion. These factors, concluded the Court of Appeals, warranted the seizure of Melvin Morales, in spite of its statement: "It may be conceded that the apprehending detectives did not have probable cause to justify the arrest of defendant at the time they took him into custody. Moreover, the record does not support a finding that the defendant consented to his detention and questioning." 22 N.Y.2d at 58, 290 N.Y.S.2d at 902, 238 N.E.2d at 310.

First, said the Court of Appeals, a serious crime had been committed and there was a "lack of practical alternative investigative techniques." 22 N.Y.2d at 64, 290 N.Y.S.2d at 907, 238 N.E.2d at 313, citing, *inter alia,* the prolix dictum of Mr. Justice Frankfurter in *Columbe* v. *Connecticut,* 367 U.S. 568. There is no support for a finding of reasonableness here. In answering a similar argument advanced in *Davis* v. *Mississippi,* —— U.S. ——, ——, 89 S.Ct. 1394, 1397 this Court said: "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." And if the police were merely interested in getting Morales' voluntary answers

there was an obvious alternative to taking him off the street and into the stationhouse. Having located Morales it should have been just as easy to solicit his voluntary answers on the spot or in his mother's place of business, in front of which Morales was seized.

Which brings us to a second basis for the finding of reasonableness below. "Police station interrogation facilitates questioning because trained investigators and stenographic facilities are present. Its privacy eliminates the distractions caused by crowds which may form during questioning conducted on the street." 22 N.Y.2d at 63, 290 N.Y.S.2d at 906, 238 N.E.2d at 313. To say that stationhouse interrogation is reasonable because of the superiority of that place for the conduct of inquiry simply overlooks, among other things, that this is essentially what led to *Miranda* v. *Arizona*, 384 U.S. 436, 455, 457, and to the stringent safeguards against detention in that place for that purpose written into the Bill of Rights. See *Terry* v. *Ohio*, 392 U.S. 1, 38-39 (dissenting opinion).

Third, the Court of Appeals pointed to the modest length of the proposed period of detention, apparently relying on Detective Daum's statement to Mrs. Morales that the officers were "only going to take [petitioner] down for questioning and keep him for maybe an hour" (R. 123). 22 N.Y.2d at 58, 61, 64, 290 N.Y.S.2d at 901, 904, 907, 238 N.E.2d at 309, 311, 313. It does not appear that a similar statement was ever made to Morales. Daum's self-serving time limit reflects, we suggest, his attempt at allaying Mrs. Morales' anxiety, getting her out of the way, if you will, thus proving that he was not bereft of reason, as the trial judge said Daum would have had to be "to let the mother talk to the son at that point" (R. 240). The offi-

cers' actions here speak for the only rational inference—they wanted Morales in their exclusive control and custody for accusation and interrogation for as long as necessary, i.e., until he confessed.

Fourth, said the Court of Appeals, "it must be noted that defendant was not formally arrested on a charge of crime within the meaning of our arrest statute, section 167 of the Code of Criminal Procedure." 22 N.Y.2d at 59, 290 N.Y.S.2d at 902, 238 N.E.2d at 310. This characterization of what happened as a technical "non-arrest" is (a) meaningless, *Davis* v. *Mississippi*, —— U.S. ——, ——, 89 S.Ct. 1394, 1397; *Terry* v. *Ohio*, 392 U.S. 1, 19; and (b) a further buttress to the conclusion that there was simply no probable cause, as required.

Fifth, according to the Court of Appeals, Morales "was the only person the police could have reasonably detained for questioning" since the "checkerboard square of the police investigation, although resting upon circumstantial evidence, pointed only to" Morales. 22 N.Y.2d at 64, 290 N.Y.S.2d at 907, 230 N.E.2d at 313. Eyewash. There are sixty-four squares on a checkerboard, and in this case the police had filled in only two squares: (i) he was an addict whose mother lived in the same multi-story building in the same public housing project as the victim; and (ii) other "junkies", who had been rounded up (R. 732-733), or one of that group, apparently had not seen Morales since the crime, and so informed the police. A holding that these two tenuous pieces of intelligence helped form a rational predicate for the seizure of Morales' person would equal a holding that like individuals with a similar familial nexus with the neighborhood could have been seized at the

will of the police. This cannot be. *Beck* v. *Ohio*, 379 U.S. 89, 97.

In sum, none of the listed factors, taken singly or in the aggregate can add up to a holding that the seizure of the defendant was reasonable within the meaning of the Fourth Amendment. We are not unmindful that the Court of Appeals went to considerable trouble to say:

> Nothing is more offensive to our deep concern for the dignity of the individual than unnecessary restraint by the police. Lengthy detention on mere suspicion breeds abuse of those safeguards which a civilized society must erect to protect even the most reprehensive of its members. However, the possibility that power given to law enforcement officers may be abused does not require that they be left powerless to make reasonable inquiry. The reasonableness of their behavior may be assured by close judicial supervision of the methods used.
>
> It is recognized that detention for questioning has its manifest evils and dangers. This decision is, therefore, limited to the exceptional circumstances presented on this appeal involving a serious crime affecting the public safety. We hold merely that a suspect may be detained upon reasonable suspicion for a reasonable and brief period of time for questioning under carefully controlled conditions protecting his Fifth and Sixth Amendment rights. Mass detentions for questioning are never permissible. The scope of the authority to question is limited to those persons reasonably suspected of possessing knowledge of the crime under investigation in circumstances involving crimes presenting a high degree of public concern affecting the public safety. [22 N.Y.2d at 64-65, 290 N.Y.S.2d at 907, 238 N.E.2d at 313-314.]

We submit that the purported protection provided petitioner's Fifth and Sixth Amendment rights does not help answer the Fourth Amendment question whether the detention of Morales violated the constitutional proscription against unreasonable seizures. The claimed acknowledgement of defendant's rights under the Fifth and Sixth Amendments relates to a separate question, i.e., whether the statements taken can be used as evidence, the Fourth Amendment violation notwithstanding—whether the intervening mention of Morales' right to remain silent, to counsel and of the possibility of his statements being used against him sufficiently purges the confessions of the primary taint of the unlawful seizure. *Wong Sun* v. *United States*, 371 U.S. 471, 488, 491. It is to the application of the exclusionary rule to this case that we now turn.

II.

The Exclusionary Rule Prevents Use of the Confessions Obtained From Petitioner After the Unlawful Seizure of His Person.

If this Court agrees with our first premise, that the police activity here violated the Fourth Amendment proscription against unreasonable seizures, the next question to be answered is whether statements made during the period of unlawful detention should be barred by the exclusionary rule that "verbal evidence which derives so immediately from . . . an unauthorized arrest" cannot be used upon trial. *Wong Sun* v. *United States*, 371 U.S. 471, 485-487. Although the opinion in *Clewis* v. *Texas*, 386 U.S. 707, hints at doubt about the applicability of *Wong Sun* to state trials, 386 U.S. at 711, n. 7, the disposition of *Traub* v. *Connecticut*, 374 U.S. 493, in which this Court remanded

a state conviction for reconsideration in light of *Wong Sun* and *Ker* v. *California*, 374 U.S. 23, can be, should be and has been read to indicate such applicability. See, *e.g.*, *Collins* v. *Beto*, 348 F.2d 823, 826; *People* v. *Robinson*, 13 N.Y.2d 296, 301, 246 N.Y.S.2d 623, 625, 196 N.E.2d 261, 262; *People* v. *Johnson*, —— Cal.2d ——, 450 P.2d 865, 75 Cal. Rptr. 401, 403; Broeder, Wong Sun v. United States: A Study in Faith and Hope, 42 Neb. L.R. 483, *passim* (1963); LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters* and Beyond, 67 Mise. L.R. 40, 110 (1968); cf. *Gilbert* v. *California*, 388 U.S. 263, 273; *Berger* v. *New York*, 388 U.S. 41, 52; *Fahy* v. *Connecticut*, 375 U.S. 85, 91. If it were otherwise, there would exist the very "double standard" and incongruence inveighed against in *Mapp* v. *Ohio*, 367 U.S. 643, 657-660.

The opinion of the Court of Appeals and the Respondent's Brief in Opposition to Petition for Certiorari, pp. 10, 40-43, *Morales* v. *New York*, No. 668 Misc. O.T. 1968, lay great stress, for different reasons, on the police testimony that Morales had been told about some of his rights. As we have indicated at the end of our first point herein, the Court of Appeals reference to the giving of the so-called warnings after Morales was securely in hand was one of the factual elements leading to the Court's conclusion that the seizure was reasonable, an effect that the warnings cannot have because probable cause alone is the standard for measuring the reasonableness of the seizure. The respondent's use of the claimed warnings is more to the point, that is, whether taking the warnings given and the other circumstances together the "primary taint" of the unlawful seizure of Morales' person had been sufficiently dissipated to take the confessions out of the reach of the exclusionary rule under *Wong Sun*.

We offer alternative reasons why this Court should hold the confessions herein barred by the exclusionary rule:

(i) the "major thrust" of the exclusionary rule is deterring unlawful police conduct, *Terry* v. *Ohio,* 392 U.S. 1, 12, and that end would be best served by application of the rule to this case, regardless of the claimed voluntariness of the confessions; and (ii) under the circumstances of this case Morales' responses to the police questioning were not "sufficiently an act of free will to purge the primary taint" of the unlawful seizure. *Wong Sun* v. *United States,* 371 U.S. 471, 486.

A. The Confessions Should Be Excluded Without Reference to Voluntariness

The essential purpose of the police activity here was to obtain custody of the petitioner for interrogation. The police had two means of effectuating that purpose without running afoul of the Constitution. The officers could have either requested Morales to consent to interrogation at the stationhouse; or seized the petitioner upon probable cause, or pursuant to a warrant. *Davis* v. *Mississippi,* —— U.S. ——, 89 S.Ct. 1394. The police made no attempt at the former, and had no basis for the latter. Since the police adopted an unlawful means to secure Morales' attendance, a sensible result is for this Court to bar the usufruct because "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it.' *Elkins* v. *United States, supra* [364 U.S. 206], at 217." *Mapp* v. *Ohio,* 367 U.S. 643, 656.

What would be discouraged by application of the exclusionary rule is the fairly common police practice of seizing a "suspect", without having adequate grounds for a formal arrest, for purposes of conducting in custody interrogation. See, *e.g.*, LaFave, Arrest: The Decision to Take a Suspect into Custody (American Bar Foundation: 1965), 300-318, 342-351, 497-499; The Uniform Arrest Act §2 (adopted by three states: Del. Code Ann. tit. 11, §1902 [1953]; N.H. Rev. Stat. Ann. §594:2 [1955]; R.I. Gen. Laws Ann. §12-7-1 [1956]; Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942); Case Comment, 44 Notre Dame Lawyer 485, 487-488 (1969); American Bar Foundation, Law Enforcement in the Metropolis (McIntyre, ed. 1967) 78-84.

Our position is essentially based on the views reflected in the American Law Institute Model Code of Pre-Arraignment Procedure (Tentative Draft No. 1, 1966). Sections 3.01 and 9.02 illustrate the rule we urge this Court to adopt. The "Note on Section 3.01" (Tent. Draft, p. 11) says:

> "This section requires that an arrest without a warrant be made on reasonable cause to believe that the person to be arrested is guilty of a felony or, in circumstances of necessity, of a misdemeanor. Thus the Code rejects 'investigative' arrests or arrests 'on suspicion.' And to maintain the integrity of the reasonable cause standard, particularly in view of the Code's authorization for a period of in-custody screening following an arrest without a warrant, Section 9.02 requires exclusion of statements following an arrest made without fair basis for belief that there was a reasonable cause. The term reasonable cause is the usual statutory equivalent of the Fourth Amendment's 'probable cause' standard."

See also, Commentary, Tentative Draft, pp. 107-109.

The Model Code deterrent is found in Section 9.02:

Section 9.02. Statements Made After an Illegal Arrest.

If a law enforcement officer, acting without a warrant, arrests a person without the reasonable cause required by Section 3.01, and the court determines that such arrest was made without fair basis for the belief that such cause existed, no statement made by such person after such arrest and prior to his release, unless it is made in the presence of or upon consultation with counsel, shall be admitted in evidence against such person in a criminal proceeding in which he is the defendant.

The rationale for this rule of exclusion is put as follows, in the notes to the above section, Tentative Draft, pp. 64-65:

This section deals with statements made after an illegal arrest. It is not addressed to the problem of statements made after such an arrest which can be deemed to be the product of coercion (see the discussion of *Wong Sun* v. *United States*, 371 U.S. 471 (1963), in the Commentary to this Article); that problem is dealt with through the warning provisions of the Code, and through Section 5.04. Rather, the section deals with statements which are by hypothesis voluntary, but which are given during custody following an arrest made in disregard of the "reasonable cause" requirement of Section 3.01. In such cases, exclusion cannot be justified as a protection of an arrested person's right to make an uncompelled choice whether or not to cooperate, because only in an at-

tenuated sense can the making of the statement be said to have been "compelled" by the illegality of the arrest. This section is, rather, an attempt to prevent abuse of the Code's provisions permitting screening following arrest.

* * * * *

Because its purpose is to deter the "investigative" arrest, this section provides for exclusion only where the arrest was made without fair basis for a belief that reasonable cause existed. Thus exclusion would not be required where the officer acted in good faith, under emergency circumstances and with colorable justification, even though a court may later determine that he made a mistake.

Where the "reasonable cause" requirement is ignored, this section does not permit use of statements even after a proper warning has issued. Since the Code requires a warning in any event, providing in this section for cure by warning would mean that no substantial additional deterrent would have been imposed to the investigative arrest; for surely the central problem of the investigative arrest is not that it is made in the hope of obtaining an immediate spontaneous admission.

The section does provide for one amelioration to the flat rule that even voluntary statements following such an arrest must be excluded: even in the case of the illegal arrest, a statement made on advice of counsel, and thus likely to represent not merely a voluntary act but one made on the basis of a tactical assessment of the situation, would be admissible. Such an ameliora-

tion would not significantly lessen the deterrent force of this section.

* * * * *

To allow use of even a voluntary statement made as a result of questioning during a period of illegal stationhouse detention would permit the authorities to make the unlawful seizure in the hope of receiving a waiver of Fifth and Sixth Amendment rights, thus allowing the violation of the Fourth Amendment to become the "instrument of a bootstrap operation to insulate unlawful police activities from the effects of the exclusionary rule." *People* v. *Johnson*, —— Cal.2d ——, 450 P.2d 865, 871, 872, 75 Cal. Rptr. 401, 406, 407. This very danger has been recognized by other perceptive writers. See Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 603-604 (1968); LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters*, and Beyond, 67 Mich. L. Rev. 40, 109-110 (1968); A.L.I. Model Code of Pre-Arraignment Procedure (Tent. Dr. No. 1, 1966), *supra*, 65. On the other hand, the salubrious effects for the system of justice flowing from application of the exclusionary rule are several.

The exclusion of any confession obtained during a period of unlawful detention should give the quietus to a variety of derelict practices—the roundup or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge (see Hogan and Snee, The McNabb-Mallory Rule, Its Rise, Rationale and Rescue, 47 Geo. L.J. 1, 22)—thereby rounding out the protection of the citizen from "an unfettered right to detention." *Miranda* v. *Arizona*, 384 U.S. 436, 482. Further, the rule we here advocate, exclusion of even voluntary statements obtained

during a period of detention founded upon a violation of the Fourth Amendment is precursed by both *Wong Sun* v. *United States*, 371 U.S. 471, and *Davis* v. *Mississippi*, —— U.S. ——, 89 S.Ct. 1394. In *Wong Sun*, this Court rejected the Government argument that Toy's statements were admissible, on the ground that under the "circumstances it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." 371 U.S. at 486. If this were all that appeared, then the speculation that *Wong Sun* was "a false start on the problem finally resolved in *Miranda*, LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters* and Beyond, 67 Mich. L. Rev. 40, 113 (1968), might have a more substantial claim to accuracy. But that is not all that appears. At the end of the just quoted passage from *Wong Sun*, 371 U.S. at 486, the Court dropped a footnote wherein it said: "Even in the absence of such oppressive circumstances, and where an exclusionary rule rests principally on nonconstitutional grounds, we have sometimes refused to differentiate between voluntary and involuntary declarations. See Hogan and Snee, The McNabb-Mallory Rule, Its Rise, Rationale and Rescue, 47 Geo. L.J. 1, 26-27," citing, as one analogous example, *Bynum* v. *United States*, 104 App. D.C. 368, 262 F.2d 465. We are not alone in reading this part of *Wong Sun* as showing the propriety of the application of the exclusionary rule in a case like Morales'. See Broeder, Wong Sun v. United States: A Study in Faith and Hope, 42 Neb. L. Rev. 483, 485, 564-578, esp. 572 (1963).

The *Bynum* case, *supra*, provides the connective for our assertion that exclusion of even voluntary confessions obtained by the authorities through access to the petitioner

while he was being held in violation of the Fourth Amendment is mandated. A simple paraphrase from the relevant part of the *Bynum* opinion, quoted in *Davis* v. *Mississippi*, —— U.S. —— at ——, 89 S.Ct. 1394 at 1396-1397, will illustrate:

> Fingerprints, articles taken from a prisoner's possession and statements given during detention have the decisive common characteristic of being something of evidentiary value which the authorities have caused an arrested person to yield to them during illegal detention. If fingerprints taken during an illegal detention are proscribed, and articles taken from a prisoner's possession are proscribed, by the same token a statement given during an illegal detention must be proscribed.

Exclusion of the confessions here, following as they did on the heels of the violation of Morales' Fourth Amendment rights, would fit precisely into the exclusionary rule. Without exclusion of Morales' confessions the constitutional guaranty against an unreasonable seizure becomes a mere "form of words," *Mapp* v. *Ohio*, 367 U.S. 643, 655, and our courts become parties to "lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Terry* v. *Ohio*, 392 U.S. 1, 13.

Finally, if the voluntary nature of any confession given so soon after the violation of the constitutional right of privacy under the Fourth Amendment permits the use of that confession, the Fourth Amendment has been relegated to a secondary place in the constellation of rights protected by the Bill of Rights. This cannot be, because

the individual freedom safeguarded by that Amendment "has been declared 'as of the very essence of constitutional liberty' the guaranty of which 'is as important and as imperative as are the guaranties of the other rights of the individual citizen.'" *Ker* v. *California*, 374 U.S. 23, 32.

B. Morales' Confessions Were Never Purged of the Taint of the Primary Illegality

If the Court does not accept our position that the exclusionary rule reaches the confessions herein regardless of voluntariness, *Wong Sun* v. *United States*, 372 U.S. 471, nevertheless requires a holding that the confessions herein should have been barred from the trial because they were the tainted fruit of the primary illegality—the unlawful seizure of Morales and the equally unlawful detention of his person at the stationhouse. As indicated earlier, we anticipate that respondent will argue that the confessions were the product of "an intervening independent act" of Morales' free will, which sufficiently dissipates the impact of the initial illegality. See *Wong Sun* v. *United States*, *supra*, 371 U.S. at 486. Further, we expect that the respondent will point to the warnings given to Morales by both seizing officers to buttress this "attenuation" argument.

Our counter-argument comes to this: Morales' responses were made in circumstances that make it unreasonable to infer that they were sufficiently an act of free will to purge the primary taint; rather, they are the result of the police exploitation of the advantage gained through the illegal seizure. See *Wong Sun* v. *United States*, 371 U.S. 471, 486, 488.

Morales was picked up by the police while he was obviously en route to his mother's place of business; as soon as he alighted from the taxicab he was taken by Detective Carroll and placed in Daum's car; the ride to the station-house, according to the testimony of both officers, was singularly free from any conversation relating to the purpose and destination of the trip (R. 46, 47, 50, 78, 172, 183, 447, 462); upon arrival, he was taken forthwith to the lieutenant's office. At this point Morales apparently encountered detective Ferguson who asked Morales whether he had killed Mrs. Brown. Morales denied his guilt and said that he had been in his mother's apartment at the time of the murder. After Ferguson left to check his alibi, Daum told Morales that he was under no compulsion to talk, could have an attorney, and that any statement made could be used against him. Morales expressed a preference to talk to Carroll. When Carroll reappeared, with coffee and cake, the first words out of Morales' mouth were: "You know, Carroll, I can't take a beating" (R. 366).

Carroll replied: "Nobody will lay a hand on you. Stop making alibis. You're building crutches to lean upon and fences to hide behind. There is only one thing you can't do, you can't lie to yourself. You can't lie to God. Do you believe in God?" (Morales—"Yes, I do.") "Well, between you and your God, did you do this thing?" (R. 367).

Morales answered: "Yes, I did" (R. 367).

Then, and only then, did Carroll reiterate the incomplete description of Morales' rights. The first full confession came immediately thereafter.

Following that, his two advisor-interrogators promptly pulled a bit of chicanery. "Daum told Melvin Morales

that he would have to repeat his story several times; that he would have to tell the story to the detective who was carrying the case; he would probably have to tell his story to the man from the Homicide Squad; and that, later, if the District Attorney came over, he would have to tell his story to him" (R. 368, 437-438, 451). At this point Carroll broke in to add that he "would not add to his statement or detract from it one whit. . . . I said to him that in order that the statement not be changed, why did he not write it down for us in his own handwriting" (R. 368-369, 437-438, 451).

Morales complied, yielding what is the second confession (R. 1308, 1310).

Upon reaching this point we can imagine counsel for respondent saying: "See! Morales was humanely treated and confessed even after being told about some of his rights at a time when the police weren't required to tell him anything. Purgation! Attenuation!" Not so.

We submit that the evidence here indicates that the unlawful detention was an "operative factor" in bringing about the confessions, *State* v. *Traub*, 151 Conn. 246, 196 A.2d 755, 757, cert. denied 377 U.S. 960; that the confessions "are so inextricably bound up with an illegal arrest so as to become 'tainted'", *Rogers* v. *United States*, 330 F.2d 535, 541. Before the taint can be said to have been purged it must appear that the illegal detention made no ascertainable contribution toward eliciting the confessions. And in this case the illegal detention was obviously meant to, and did, operate as a means of enhancing the likelihood of extracting an admission of guilt. Certainly if the police want to create an atmosphere conducive to success-

ful interrogation, there is no better place than the station-house, where the interrogators "'possess all the advantages'". *Miranda* v. *Arizona*, 384 U.S. 436, 450. Even the humane attitude assumed by the police is a recognized auxiliary means of leverage. Id. at 451. One author has gone so far as saying: "Before *Miranda*, not only was the warning useful in warding off legal attacks, but it also had its utility as a ploy in obtaining confessions." Robinson, Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply, 1968 Duke L.J. 425, 469. The overall atmosphere created by the unlawful seizure here must be seen as it was intended to be—oppressive, intimidating. The conduct of the officers, including laying in a supply of goodies, should indicate to anyone that all were settling down for an extended session. Add to this the fact that Morales was a known addict, a member of a group known to be prone to show disorientation, lack of judgment, and emotional instability, *Hansford* v. *United States*, 122 App. D.C. 320, 365 F.2d 920, 922, and the totality of the circumstances points to the inference that the initial advantage gained by the police must have contributed to the confessions; it would be unreasonable to infer that it was solely an act of free will that produced Morales' confessions. Rather, the apter conclusion is that the evidence of guilt was come at by exploitation of the advantage gained through the illegal seizure of Morales' person. Good sense reveals no break in the connection between the unlawful detention and the first confession, the first confession and its progeny, the ensuing confessions, see *United States* v. *Bayer*, 331 U.S. 532, 540-541; *People* v. *Spencer*, 66 Cal.2d 158, 167-168, 57 Cal. Rptr. 163, 170, 424 P.2d 715, 722. Good sense shows no taint purged, no

attenuated link, to warrant any conclusion other than that the confessions were one and all the forbidden produce of the seizure. *Cf. Nardone* v. *United States*, 308 U.S. 338, 341. Declarations so directly derivative from illicit conduct must be, and are, barred under the exclusionary rule. *Wong Sun* v. *United States*, 371 U.S. 471, 486, 488.

The alleged warnings given to Morales so close in time to his arrival at the stationhouse did not constitute a significant change in the circumstances to permit a finding that there was any diminution of the devastating psychological impact of the unlawful arrest. See *Collins* v. *Beto*, 348 F.2d 823, 828; *cf. Wong Sun* v. *United States*, 371 U.S. 471, 491. In this connection, several empirical studies have indicated that the usual frame of mind of one brought suddenly into intimate contact with the police at their base is consternation and confusion, and one study establishes that even those in police custody who received the fourfold warnings of *Miranda* v. *Arizona*, 384 U.S. 436, evinced marked misunderstanding of their meaning and implications. Medalie, Zeitz, and Alexander, Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda, 66 Mich. L.R. 1347, 1372-1379, 1396-1398 (1968); see also Interrogation in New Haven: The Impact of Miranda, 76 Yale L.J. 1519, 1613-1614 (1967); Griffiths and Ayres, A Postscript to the Miranda Project: Interrogation of Draft Protesters, 77 Yale L.J. 300, 309-310 (1967). In light of this, the rapid fire succession of events from seizure at 8:00 P.M., the silent ride to the stationhouse, the first mention of his rights at about 8:30 P.M. and the immediately ensuing interrogation leading to the first damning utterance at about 8:45 P.M. indicates that Morales hardly had time to think about anything, let alone

the merits of the police remarks about his right to counsel and to remain silent.

Finally, we do not mean to say that no voluntary confession can ever follow a period of unlawful detention. What we do mean to say is that an admission of guilt emerging from a course of lawless police conduct designed to encourage the giving of a confession must carry the stigma of the conduct, the taint of the primary illegality. The illicit mating of Morales' initial unlawful detention and the conduct of the interrogation must be seen as bastardizing his confessions, and these illegitimate offspring should be barred from court.

III.

In the Totality of the Circumstances Revealed by the Record Herein the Petitioner's Confessions Were Not Voluntary.

The admission into evidence of Morales' confessions violated due process because those confessions were involuntary. While Morales cannot claim the protection of *Miranda* v. *Arizona*, 384 U.S. 436, we note that if that case applied here the confessions would be barred. Although counsel urged the involuntariness of Morales' confessions before the New York State Court of Appeals, that Court swept the issue aside, saying: "Our review of the other questions raised on this appeal finds no error. . . . " 22 N.Y.2d at 65, 290 N.Y.S.2d at 907, 238 N.E.2d at 314.

Notwithstanding the findings of the courts below, this Court has the "duty in this case . . . dealing with the question whether a confession was voluntarily given, to ex-

amine the entire record and make an independent determination of the ultimate issue of voluntariness." *Davis* v. *North Carolina*, 384 U.S. 737, 741-742. A realistic appraisal of the facts in this case (*Beecher* v. *Alabama*, 389 U.S. 35, 38), taking only the prosecution version of the facts as representing the totality of the circumstances (*Clewis* v. *Texas*, 386 U.S. 707, 708), and disregarding the petitioner's claim of brutality (*Greenwald* v. *Wisconsin*, 390 U.S. 519, 521) compels the conclusion that the confessions herein were not voluntarily given.

Recognizing that each case must turn on its own facts (*Reck* v. *Pate*, 367 U.S. 433, 442) we submit that substantial doubt about the voluntariness of the confessions is generated by the following:

Morales was a drug addict, and Detective Carroll knew it (R. 392). Morales was whisked off the street, without any probable cause for his detention. The shock value of that event on one of those unfortunates of notorious instability certainly must have undermined any power to make a truly voluntary confession. *Cf. Clewis* v. *Texas*, 386 U.S. 707, 711, 712. He was deliberately cut off from his only ally in the field, his mother, and taken to a place not revealed to her. It is undisputed that when Mrs. Morales attempted to counsel her son at the time he was taken into custody, she was denied access to him (R. 817-819). The trial judge, at the close of the pretrial hearing on the question of voluntariness, said that the officers would "have to have their heads examined to let the mother talk to the son at that point" (R. 242). This Court has said: "The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them." *Haley* v. *Ohio*, 332 U.S. 596, 601.

Morales was not told anything until after he had been safely removed to the privacy of the stationhouse (R. 46, 47, 50, 78, 172, 183, 447, 462). At the stationhouse, neither Daum nor Carroll ever advised Morales of all his rights, omitting any mention of the availability of assigned counsel to one who patently could not afford to hire one. *Cf. People* v. *Post*, 23 N.Y.2d 157, 295 N.Y.S2d 665, 242 N.E.2d 830. Adding this weighty factor (*Davis* v. *North Carolina*, 384 U.S. 737, 741) to the ensuing false statement that Morales was under an obligation, having once confessed, to repeat that confession to a string of oncoming interrogators (R. 368-369, 437-438, 451) and it is almost as if no warnings had been given. Further, Morales' first statement to Carroll, "You know, Carroll, I can't take a beating" (R. 366), indicates a man in fear, rationally or not, who could expect no solace in his isolation from the outside world.

Following his initial oral and written confessions, Morales recited for a parade of police officers and an assistant district attorney quizzing him singly, in pairs and in concert (R. 724, 743, 744, 498-499, 589, 590-593, 671, 673, 677). His final performance was a re-enactment of the crime at the scene sometime after 1:00 A.M. on October 24, 1964 (R. 599-600, 673).

Two events subsequent to the above incriminatory incidents should be evaluated for the possible light they shed on the question of voluntariness. See *Haley* v. *Ohio*, 332 U.S. 596, 600. Morales was taken to a local hospital at about 4:00 A.M. on October 14, 1964 to be treated for narcotic withdrawal symptoms (R. 947-948, 1089-1094, 1050-1051) lending some credence to his claim that he was suffering from withdrawal pains during the course of his earlier interrogations (R. 920). A second event that merits

some comment tends to indicate that Morales' tractability at the stationhouse is attributable to something other than an unfettered act of his free will. Several days after his arraignment, on October 20, 1964 to be exact, Morales was visited at the Bronx House of Detention by Detectives Durkin and Carroll (R. 656). The formerly lamb-like Morales, now removed in time, space and circumstances from the kind of domination that surrounded his interrogation on October 13-14, flatly refused to speak to the officers because he had been told not to (R. 660). In brief, the now dried-out Morales was possessed of a resolve and clear understanding of his right not to talk to the police that was lacking a week earlier when he was under the sole domination of the police.

In sum, there is no proof beyond a reasonable doubt that any of the several confessions was voluntarily given. The record shows that some of the confessions, if not all, were the product of a will overborne by the cumulative effect of a virtual abduction by Detectives Daum and Carroll; continuous incommunicado interrogation of a known addict over a period of five or more hours in the course of an evening that ends with the petitioner in the hospital. A finding of guilt if based only in part upon a single involuntary confession is violative of due process. *Lisenba v. California*, 314 U.S. 219, 236.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

July 4, 1969.

Respectfully submitted,

Richard T. Farrell,
Counsel for Petitioner

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IN THE

Supreme Court of the United States

October Term, 1969

No. 86

MELVIN MORALES,

Petitioner,

against

NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

October Term, 1969

No. 86

MELVIN MORALES,

Petitioner,

against

NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE RESPONDENT

Question Presented

1. Did the admission into evidence of sundry types of confessions made by the petitioner violate his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution?

Statement of the Case

A. Prefatory Note Pertaining to the History of This Litigation

On August 4, 1964, one Addie Brown was murdered in the elevator of her Bronx County apartment house by an assailant who stabbed her repeatedly. After investigation, the petitioner Melvin Morales—now serving a life sentence—was allegedly detained; formally arrested after confessing; indicted; tried; and convicted of that brutal murder on the strength of evidence summarized hereinafter, which proof included various types of confessions, the constitutional admissibility of which is the subject of this review.

Indeed, as petitioner would have it, this case provides a vehicle for resolving a question not yet decided by this Court, *viz.*, whether the exclusionary rule utilized by federal and state courts as a device to deter police abuses of Fourth Amendment rights is available in state courts to suppress confessions made by an accused person following his investigative seizure on less than probable cause [see, *e.g. Terry* v. *Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 1879 n. 6 (1968)]. That claim, needless to say, presupposes the illegality of the detention of the petitioner Morales, who also argues both the inapplicability of the doctrine of attenuation to cases like the instant one and also the lack of a basis for applying it herein. Relative to the latter contention, petitioner avers that his confessions were products of a will overborne.

Our view, however, is that petitioner's constitutional rights were in no way abridged and that, even assuming the contrary with respect to his Fourth Amendment contention,

the exclusionary rule should not be automatically applied to situations like the one at Bar. Were this Court to reject only our arguments in support of the latter position, our feeling would still be that a reversal solely on Fourth Amendment grounds of the state court judgment would not be in order, but rather that the case should then be remitted to the jurisdiction of conviction for the purpose of taking further evidence on the subject of the lawfulness of petitioner's detention. More specifically, such an inquiry, as we see it, would turn on (1) the facts precipitating the detention of Melvin Morales, and (2) the facts respecting whether or not the petitioner voluntarily surrendered himself to the authorities, either of which inquiries conceivably could adduce additional proof defeating the claim to the protection of the Fourth Amendment. A short outline of the various proceedings in the state courts will, we believe, demonstrate that respondent possibly is before this tribunal without all the evidence relevant to those questions that might have been available if the Fourth Amendment point had been pressed from the outset of this litigation.

The trial of this case began on May 3, 1965, and, pursuant to the procedure mandated by this Court [*Jackson* v. *Denno*, 378 U.S. 368, 84 S. Ct. 1774 (1964)], the trial judge conducted a hearing outside the presence of the jury on the voluntariness issue—a proceeding known in New York as a *Huntley* hearing [see *People* v. *Huntley*, 15 N.Y.2d 72, 255 N.Y. Supp. 2d 838, 204 N.E. 2d 179 (1965)]. Of note is the fact that that proceeding took place before the landmark opinion in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) was handed down, which holding of course is not retroactive in its application [*Johnson* v. *New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966)].

At the hearing, the petitioner Morales offered testimonial evidence from witnesses other than himself seeking to establish that he had been denied access to family while circumstanced in the so-called "accusatory stage" [see *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758 (1964)]. That contention was rejected by the hearing judge.

The defense reiterated the aforesaid claim at the trial, in addition to which Melvin Morales voiced the allegation that his confessions had been involuntarily elicited from him by a combination of police brutality and concomitant throes of withdrawal from narcotics. Beyond that, an alibi defense was also interposed by him and supported by members of his immediate family. Ultimately a jury rejected those assertions on the strength of prosecution evidence, the legal sufficiency of which is, in our judgment, patently unassailable.

Accordingly, the lawfulness of the alleged investigative detention was not an issue litigated at the trial court stage. Yet, in the course of the proceedings at that level, evidence adduced for other purposes demonstrates that, as a result of the labors of a number of New York City detectives—assuming no actual surrender—the detention of petitioner was in all respects lawful. Indeed, it is our view that the incidental proof about which we are speaking is also sufficient to paint a vivid word-picture of the petitioner as a guilt-stricken murderer fearful of Divine retribution who, in expiation for his unspeakable transgression, in a very real sense surrendered himself and thereafter readily confessed his guilt to the authorities.

When this case reached the Appellate Division of the New York Supreme Court, the petitioner simply argued that his confessions should have been excluded because he had not been effectively given *Escobedo*- and *Miranda*-type admonitions, but the retroactivity question was resolved insofar as New York was concerned while the instant case was *sub judice* in the tribunal aforesaid [see *People* v. *McQueen,* 18 N.Y.2d 337, 274 N.Y. Supp.2d 886, 221 N.E.2d 550 (1967)].

The alleged Fourth Amendment issue was raised, *inter alia,* for the first time in the Court of Appeals by newly assigned counsel, who relied heavily upon the United States Court of Appeals for the Fifth Circuit's interpretation of this Court's decision in *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407 (1963) [see *Collins* v. *Beto,* 348 F.2d 823 (5th Cir. 1965)]. Contrariwise, the prosecution argued in its brief that the Fourth Amendment was not herein involved and that, even if that Amendment were applicable, it must be said on the instant record that the "primary taint" stemming from the infringement of constitutional rights was attenuated as a consequence of the fact that the confessions resulted from the free exercise of the petitioner's will [see also, *People* v. *Dentine,* 21 N.Y.2d 700, 287 N.Y. Supp.2d 427, 234 N.E.2d 462 (1967)]. Additionally, on oral argument, the prosecution pointed out that the probable cause issue had not been developed below and that, as a matter of objective fact, the People might have possessed the requisite quantum of evidence. However, no remand to develop relevant evidence was specifically requested by the prosecution at that time because of its view that attenuation was clearly established in the instant record.

Incidentally, at the time this case reached the tribunal to which we have just referred, the law in New York was that a confession obtained during a period of detention that was illegal either because the arrest had not been predicated on probable cause [*People* v. *Everett,* 10 N.Y.2d 500, 506-7, 225 N.Y. Supp.2d 193, 166 N.E.2d 831 (1961); *cf. People* v. *Robinson,* 13 N.Y.2d 296, 246 N.Y. Supp.2d 623, 196 N.E.2d 261 (1963); *People* v. *Rodriguez,* 11 N.Y.2d 279, 229 N.Y. Supp.2d 353, 183 N.E.2d 651 (1962)] or because there had been an unreasonable delay in arraignment [*People* v. *Vargas,* 7 N.Y.2d 555, 565-6, 200 N.Y. Supp.2d 29, 166 N.E.2d 831 (1960); see *People* v. *Carbonaro,* 21 N.Y. 2d 271, 287 N.Y. Supp.2d 385, 234 N.E.2d 433 (1967)] was not inadmissible for either reason alone; but rather the illegality was viewed as a factor bearing upon the voluntariness issue.

In the New York Court of Appeals, there were two concurring opinions [*People* v. *Morales,* 22 N.Y.2d 55, 290 N.Y. Supp.2d 898, 238 N.E.2d 307 (1968), *cert. granted,* 394 U.S. 972, 89 S.Ct. 1472 (1969)] affirming the order appealed from, one of which was written by Chief Judge Fuld who concurred in the result only because the "* * * defendant waived his constitutional rights and acquiesced in his being interrogated by the police at the police station." The quoted remark, we submit, could be understood as meaning that a surrender by Morales may be found on the instant record—a view explicitly rejected by the other members of the court.

The rest of the jurists on New York State's highest court also joined in an opinion by Judge Jasen, wherein it

was stated that the absence of probable cause to arrest Morales "may be conceded"—a concession never made by the prosecution herein. In any event and by employing a balancing of interests approach, those jurists found that, on the facts of this case, the interference with petitioner's right to privacy and to freedom of movement was not unreasonable within the meaning of the Fourth Amendment. Moreover, the opinion narrowly confined the ambit of lawful seizures of the person, both at inception and in scope. Specifically, it limited investigative detention upon "reasonable suspicion" to a reasonable and brief period of time under conditions protecting the suspect's Fifth and Sixth Amendment rights in the case of persons reasonably suspected of possessing knowledge about a crime presenting a high degree of public concern affecting the public safety [see also, *People* v. *Herbison*, 22 N.Y.2d 946, 295 N.Y. Supp.2d 162, 242 N.E.2d 394 (1968)]. Mass detentions for questioning were of course condemned by those members of the court.

Prior to filing his petition for a writ of *certiorari* in this Court, Morales successfully moved in the New York Court of Appeals to amend the remittitur [22 N.Y.2d 753, 292 N.Y. Supp.2d 130, 239 N.E.2d 221 (1968)] so that it would reflect the fact that his Fifth and Sixth Amendment claims were also considered in that forum. For that reason and because we feel that the record in this Court is adequate for the purpose, it seems to us that no barriers presently exist to a consideration of respondent's contention that the taint of illegality stemming from any conceivable infringement of the petitioner's Fourth Amendment rights was dissipated by his freely made decision to confess—one of a number of arguments made hereinafter.

Several days after the *remittitur* was amended, this Court decided the so-called "Stop and Frisk" cases [see

Terry v. *Ohio, supra*; *Sibron* v. *New York and Peters* v. *New York*, 392 U.S. 40, 88 S.Ct. 1889 (1968)].

The petition for the writ of *certiorari* in the instant case, filed August 10, 1968, was opposed by the respondent on both legal and pragmatic grounds. As for the former, argumentation in large part was devoted to efforts seeking to demonstrate that the "Stop and Frisk" precedents were dispositive herein. In connection with the latter ground, respondent pointed out that this Court possibly would deem it necessary to remit this case to the state courts for the taking of additional evidence on the Fourth Amendment question.

B. The Evidence

Events surrounding the violent death of Addie Brown

On the last night of her life, Addie Brown, who was estranged from her husband, gave a party at her home, Apartment 9-B in a 21-story residential building containing over a hundred dwelling units located at 700 East 156th Street, County of Bronx, City and State of New York, after which that fifty-six-year-old woman decided to accompany two of her female guests to the subway (Collins 747-9, 755; Wright 758-9; Durkin 493).* Thus, at approximately 2:20 a.m. on Sunday, October 4, 1964, the three women left the apartment, at which time one of the other ladies observed the now deceased—who wore a wig (Peo.'s Exh. 10, 510,

* Unless otherwise indicated, references are to pages of the printed Record on Appeal to the Supreme Court of the State of New York, Appellate Division, First Department. Page references followed by the suffix "H" indicate testimony elicited at the voluntariness hearing.

1311)—placing her apartment keys into a change purse she had in her hand (Collins 753, *cf.* 763; Wright 761-2). At about 2:45 a.m. in the subway station, Addie Brown waved good-by to her friends (Collins 750; Wright 757).

Sometime between 3:00 a.m. and 3:30 a.m., two men in an eleventh floor apartment of premises 700 East 156th Street heard a female screaming, after which they ran into the hallway (Wales 288-90; Carr 318-9). One of them, Correction Officer Lionel Wales, looked into both elevator shafts but saw no cars, after which he ran up to the twelfth floor and looked down one of the two elevator shafts (Wales 290). Whereupon, he started back to the eleventh floor (*ibid.*). While on the stairs between floors, Wales heard someone running down the stairs, which sounds he believed were made by a male and came from two or three floors below, and which sounds continued until the witness heard a "door" (*id.* 296, 305-10).

At the start of Wales' peregrinations, one Dudley Ivan Carr, exited from the former's apartment and started walking towards one of the elevators with him, at which time Carr heard rapid footsteps which sounded like they came from the stairwell and from "above me" (Carr 319, 321-2). When Wales went upstairs, Carr pressed the elevator button, causing the car to descend to the eleventh floor (*id.* 320).

A woman was standing in the car, and the observer noted that she was bleeding from the face and that she had a wig in her hand (*ibid.*). Then, Carr and Wales, who had returned, helped the woman out of the elevator, after which they sat the lady down and tied a towel around her

back to stop the bleeding from that part of her body (Wales 293; Carr 321; Peo.'s Exhs. 1 through 7; 287, 298, 1294, 1307).

The victim was alive at this point, but she did not respond when Wales asked who her assailant had been (Wales 295-8). Similarly, while still alive, the woman in question did not answer inquiries by one of the first police officers to arrive at the scene (Covello 349-50). An ambulance attendant arrived at about 3:20 a.m., and death was pronounced at approximately 3:30 a.m. (*id.* 352-3).

The body of the victim—later identified by her estranged husband as Addie Brown—had 31 stab wounds on its surface: some of which penetrated into the chest cavity and/or into the lungs causing massive hemorrhage, while another severed the right external jugular vein (Edberg 253-4, 261; Browne 335-6). The wounds aforesaid and the hemorrhage caused death (Edberg 253-4, 261).

Investigation of the murder and circumstances leading up to the alleged investigative detention of Melvin Morales

Detectives at the scene learned the identity of the deceased by trying to open various apartment doors with a set of keys that had been found in the elevator, which process finally led them to the victim's home, Apartment 9-B (Durkin 492-3, 545). In the course of these labors, they asked some residents of the building to view the corpse and questioned most of the tenants, estimated to have been a hundred or more in number (*id.* 493). Thus, investigatory efforts within the premises were directed from the eleventh floor, where the witnesses Carr and Wales were with Detective Durkin "for sometime" (*id.* 515).

At a point in time not fixed by the record other than its having preceded the ultimately successful police efforts to identify the dead woman, Detective Anibal Texeira was instructed in connection with those endeavors to leave the building and to check out a reported fight between a man and a woman earlier that evening at a Ralph's Bar and Grill (Texeira 1063). Learning from a bartender that a man called "Shorty" had been involved in the fracas, Texeira brought a person known by that sobriquet to the station house (*ibid.*). There, the police officer ascertained that "Shorty" had fought with a girl-friend and slapped her, after which the disputants went home (*ibid.*).

At about 3:30 or 4:00 a.m. on the day and in the premises in question, Augusto ("Snooky") Morales, a brother of the petitioner, was waiting for the elevator on the thirteenth floor after leaving a friend's apartment when some detectives arrived, frisked him and searched him (A. Morales 153-4H). Thereafter, at a time not precisely pinpointed in Augusto's testimony, he was taken to the eleventh floor; asked if he could identify a dead woman sprawled thereon; and otherwise interrogated (*id.* 155H). Augusto Morales then claimed to have been, during the critical time, in a bar and later at the home of a friend—seemingly the tenant of the thirteenth floor apartment (Durkin 67-70H).

Detectives Texeira and Melvin Black later went to the Morales' home—Apartment 3-B—and their arrival at that suite about 5:00 or 5:30 a.m. coincided with that of one Leon Morales, a musician and another brother of the petitioner, whom Detective Texeira interrogated in the hallway

(Texeira 1058; Black 1065-6). The apartment door was opened by the petitioner's mother, Rebecca Morales, who gave Black permission to enter the apartment, and who, upon being asked, responded that her son Augusto and his wife were with her in that suite (Black 1066). Asked if anyone else lived with her, Mrs. Morales replied that another son named Leon did, adding that Leon was not home at that time (*ibid.*). Rebecca Morales summoned her son Augusto at the request of Black, which officer asked that man about "where he had been" and if he would get dressed in "the same clothes he had on at that time" and accompany him upstairs (*ibid.*). Augusto Morales was "interviewed" on the eleventh floor by a Sergeant Pepe (Texeira 1058; Black 1067). It is not clear in the record whether this visit to the eleventh floor was the one Augusto Morales described in his testimony or whether there were two such occurrences.

At approximately 6:30 or 7:00 a.m., Texeira and Black again went to the Morales' apartment, after which Leon, his brother Augusto, the latter brother's wife, Yvonne, and Mrs. Rebecca Morales went to police headquarters. The record, while indicating rather clearly that Augusto Morales was the person with whose activities the authorities were concerned, is somewhat equivocal on the subject of how so many members of the family happened to go to the station house.[1]

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1. The visits by Texeira and Black to the Morales' apartment, incidentally, had an added significance at the trial in connection with the alibi proffered by the petitioner; to wit, that from the evening of October 3rd until just before his relatives left for the police station the following morning, he had been continuously present in his mother's apartment, sitting and sleeping at the dining room table (M. Morales 886-7). He added in that connection that he had left

Thus, the officers in question testified that they had requested the individuals under discussion to accompany them to the pertinent location (Texeira 1058; Black 1067). But, Mrs. Rebecca Morales testified both that the policemen asked the family members to go with them and that she succeeded in obtaining permission from the officers for the others to accompany Augusto (R. Morales 147H). Additionally, she averred that Augusto never returned after being taken from their apartment (*id.*), and that she had not even seen him being taken to headquarters (*id.* 801). According to Leon Morales, the police informed only "Snooky" that he had to go with them, after which the mother of the Morales brothers said she was upset and that she "* * * would like us all to go down to make sure he was not railroaded. She didn't use those exact terms" (L. Morales 880). On the same subject, Yvonne Morales, wife of Augusto, testified that her brother-in-law Leon had driven her and her mother-in-law to the station house in his automobile (Y. Morales 859).

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the apartment before the others and was stopped by a police officer, who asked Morales some questions, searched him, and permitted the petitioner to proceed (*id.* 887-8). The assertions by the petitioner described earlier in this paragraph were verified by his mother, who also claimed that no police officer had entered her apartment far enough to be able to see the petitioner at the dining room table (R. Morales 791-802, 807, 839, 846). Leon Morales confirmed the relevant averments of both the petitioner and their mother (L. Morales 876-81). Yvonne Morales further bolstered those allegations, except that she admitted not seeing the petitioner between 11:30 p.m. on October 3rd and 6:00 a.m. the following morning, during which time she was apparently sleeping (Y. Morales 853-9, 1136). On the other hand, prosecution evidence established that Detective Black had actually entered the apartment both times and looked in some rooms—including the dining room on at least one occasion—without seeing the petitioner; but during the latter visit, the bathroom was occupied by Yvonne Morales according to what her mother-in-law told the officer in question (Texeira 1057-9, 1064; Black 1065-85).

Augusto Morales remained at the precinct until about 2:00 p.m. on the afternoon of Sunday, October 4th—the earliest feasible time that his story about having been in a bar could be verified because of Sabbath laws forbidding licensed premises from opening before the afternoon (Durkin 67-70H; A. Morales 156-7H; R. Morales 147H). Under circumstances not described in the record, a second visit to the police station on October 5th was made by Augusto—a man who looked like his brother Melvin in the opinion of "everyone" (R. Morales 143-4H; A. Morales 156-7H, 160H). According to one detective, Augusto Morales mentioned having a brother named Melvin sometime on the morning of October 4th (Durkin 524). Melvin Morales, as our narrative will soon indicate, was known as a convicted narcotics offender to certain detectives working on this investigation.

From October 4th on, numerous detective squads investigated the Addie Brown murder, including those led by Louis Golly of the Homicide Squad and Thomas Durkin of the 42nd Squad, which latter officer was the man ultimately credited for the arrest under police department procedures (Daum 445, 453; Durkin 488; Golly 585; Ferguson 740). Many persons were questioned during the investigation which culminated on October 13, 1964, such as two women guests at the deceased's last party who were interviewed on or about October 5th at police headquarters and who later became prosecution witnesses (Carroll 362; Durkin 568, 668-9; Golly 586; Ferguson 745). During investigatory efforts, detectives from the various squads working on the case exchanged information, such as a piece of intelligence to the effect that Melvin Morales was no longer to be found in his usual haunts (Durkin 524-5; Ferguson 740, 745; see Carroll 394-5).

On October 5, 1964, Detective Aubrey Ferguson, who was working on this case and who had known the petitioner since 1950, met the latter's mother outside premises 700 East 156th Street (Ferguson 730). That police officer, who did not know the petitioner's brothers, asked the woman where her son was, to which question she replied that "* * * she doesn't know, she hasn't seen him for quite sometime, he doesn't live with her" (*id.* 731). As for that incident, Mrs. Rebecca Moraels explained at trial that her pertinent utterance had pertained to one of her sons other than the petitioner (R. Morales 848-9).

Detective Ferguson also testified that he had taken part in the questioning of several narcotics users in the vicinity of the crime scene about a week after the untoward incident, as is illustrated by the following colloquy:

> "Q. Did you do anything further after October 4, in trying to ascertain the whereabouts of this defendant? A. I did.
>
> Q. Well, when was that? A. It was after the week-end; it must have been. He was—the 13th—the week-end of the eleventh or twelfth. We rounded up several narcotic users; we call them junkies, in the vicinity. And we had conversations with them. And from them we learned that Moral—
>
> Q. Don't tell us what you learned from the junkies. Just tell us what you did. Now you have told us—
>
> A. As a result of our conversations with these junkies, we then concentrated our efforts in an effort to locate Morales." (Ferguson 732-3).

Within the week, investigation also led the police to a "young boy," Everett Roberts, who later testified at the trial that he had seen the petitioner sitting on a bench out-

side the premises wherein the murder occurred at about 3:20 a.m. on the critical morning (Roberts 697-714).

On cross-examination by defense counsel, this witness explained that, at the pertinent time, he had just walked his friend, Charles Green, to the latter's home—the building in which the murder occurred—and was returning to his own abode, wherein the witness, his friend, and their "group" had been practicing musical arrangements earlier that evening (*id.* 699-703).

Green told the witness Roberts about the murder later that day, Sunday, October 4, 1964 (*id.* 712). On the following Saturday, three or four detectives came to Roberts' home, and that witness also talked to one of those officers during the following week (*id.* 704-5, 713). During interrogation by those policemen, the witness Roberts told about having seen the man sitting on the bench and he described that person in the same manner as he did later at the trial—in which court proceeding he positively identified the petitioner Melvin Morales as the individual he had observed near the scene of the crime at the pertinent time (*id.* 698; 705-6; 713-4). On a particular Wednesday morning—not otherwise pinpointed in the record—Roberts identified the petitioner at police headquarters (*id.* 707-8).[2]

Additionally during the investigation, Detectives Daum and Leslie Carroll interviewed Mrs. Rebecca Morales at

2. Apparently because of the witness Roberts' inability, during cross-examination, to fix with certainty the month in which he had made the critical observation (Roberts 703), the prosecutor stated on summation that he did not put "much stock in the little boy" (1192). However, the attorney for the state went on to tell the jury, in essence, that the issue of credibility was one for their resolution (*ibid.*).

her home on October 12th and 13th, and the latter officer acknowledged that he might have made an earlier visit on the 10th (Carroll 409-17; Daum 444-8, 455-9). On October 12th, Rebecca Morales was informed that the police wished to interrogate her son Melvin about the Addie Brown homicide, and she told them that the petitioner had been in her apartment at the critical time (*ibid.*).

On the subject of these visits, Mrs. Rebecca Morales testified on direct examination that, on Saturday, October 10, 1964, at about 11:00 p.m., Detectives Carroll and Daum visited her home (R. Morales 111-3H). In ensuing conversation, the petitioner's mother was told that the police wished to interrogate Melvin Morales, but they did not cite the reason (*id.* 114-5H). Mrs. Morales informed the visitors that Melvin came to her home and to her beauty parlor "all the time," and that he might come to her apartment that night (*ibid.*).

On Monday, October 12th, the same two policemen again visited Mrs. Morales about midday (*id.* 116H). At that time, the female witness informed the officers that her son Melvin had phoned and asked her what time she would be home, and that she had told him about 6:00 or 7:00 p.m. (*id.* 117H). Whereupon, one detective asked the witness to get in touch with the police if Melvin called, after which Mrs. Morales averred that her son Melvin was not running away or hiding, that it was no problem to find him, and that she would give them the telephone number to her shop (*ibid.*).

The witness, during further colloquy about why the police wished to question Melvin, remarked, "For what, to do the same thing that you did to my other son Snooky,

take him down for questioning for something?" (*id.* 118H). One of the officers answered affirmatively, adding, in substance, that they would let the petitioner go after interrogation (*ibid.*). Whereupon, the witness asked, in essence, if she could be present at the interrogation, in response to which inquiry she was informed "* * * it isn't necessary * * *" (*ibid.*).

On Tuesday, October 13, 1964, Mrs. Morales received a telephone call from the petitioner, during which conversation she informed her son that Mr. Carroll wanted to talk to him (*id.* 119H). Thereupon, the petitioner said, " 'All right, Mother, I will come up to see them.' " Mrs. Morales then said, " 'O.K. Come up to the beauty parlor,' " and her son replied, " 'All right, I will be up there' " (*ibid.*).

In that vein, the petitioner acknowledged himself from the witness stand that, prior to his arrest, his mother had informed him over the telephone that Carroll wished to speak to him, but he was uncertain as to the exact date of that conversation which he believed might have been on Sunday, October 11th (M. Morales 904).

On cross-examination, Rebecca Morales admitted having told the petitioner on October 4th in her apartment that the police wished to interrogate his brother about the murder by stabbing that had occurred earlier that morning in her residence building, and she averred that, between that day and October 13th, she had seen petitioner in her home on Wednesday, Thursday, and Friday and in her shop on Saturday (R. Morales, 144-52H).

Events of October 13th following her telephone conversation with the petitioner were also detailed in the

direct examination of the witness in question (*id.* 120-6H, 132-3H, 812-9).

While in her business establishment about 4:00 p.m. that afternoon, Mrs. Morales received a telephone call from Detective Carroll, during which the former assured the caller that the petitioner would come to her shop that evening (*id.* 120H). Later on about 8:00 p.m., Detective Daum entered the shop, told Mrs. Morales that her son Melvin had arrived in a taxicab and asked if she wished to pay the $1.10 fare owing to the taxidriver (*id.* 121-2H). While still inside the store, Mrs. Morales expressed a desire to speak to the petitioner, but Daum informed her that it was not necessary because they were "* * * only going to take him down for questioning and keep him maybe an hour" (*id.* 123H).

On the street thereafter, Daum again refused to let the woman in question speak to the petitioner, who was then seated in an automobile with Detective Carroll (*id.* 125-6H). As Daum approached that vehicle, he again told Mrs. Morales that she could not speak to her son, touching the witness firmly but not roughly at that time (*id.* 126, 132-3H).

Turning to the prosecution evidence respecting the "seizure" of Melvin Morales, the record shows that Detectives Carroll and Daum, after leaving Mrs. Morales' home on October 13th, saw her enter a taxicab and followed behind that vehicle, thereafter losing the taxi but ultimately arriving at the beauty parlor about 1:30 p.m. (Carroll 363-4; Daum 445-6). The officers stayed in the area, and later that afternoon Carroll telephoned Mrs. Morales (Car-

roll 364). When the petitioner arrived at about 8:00 p.m., Carroll placed him in the other detective's privately-owned automobile, while Daum went and had a conversation with Mrs. Morales about the cab fare owed by her son, after which they both exited from the shop (Carroll 374-6; Daum 446-8). At that time, petitioner was not free to go (Daum 463). While he did not specifically remember such an occurrence, Daum acknowledged that Mrs. Morales could have asked him to speak to her son (*id.* 461). Before driving off with the petitioner, Detective Carroll promised to phone the former's mother (Carroll 388).

Prior to the alleged seizure of the petitioner, Detective Carroll, who knew Melvin Morales, suspected the latter of being a narcotics user because of conversations with petitioner's father four or five years before the time herein critical (*id.* 86-7H)—as contrasted with other members of the police department investigating this case who knew that the petitioner had a record of narcotics convictions or that he was a user (Golly 617; Ferguson 732). He added that the petitioner Morales had been picked up for questioning because investigation revealed that "* * * Morales had been a constant and habitual frequenter of the area and could have been seen at almost any time of the day or night in the area, and that shortly after this thing occurred, that he had absented himself therefrom" (Carroll 394-5; Durkin 524-5).

When pressed about the state of his personal knowledge at the time he took the petitioner into custody, Carroll made the following responses:

"Q. You said that you knew two days before [i.e., the 11th] that you wanted to question the defendant Melvin Morales, isn't that so? A. Yes, sir.

Q. Is there any question about that, sir? A. No, sir.

Q. All right. Was he a suspect in connection with the homicide that occurred on October 4th?

Mr. McCarthy: Well, again, the same objection. That's a highly technical work, in view of the recent decisions of the Court. I think we ought to have a clarification of it.

Mr. Muschio: On the contrary—

The Court: Explain to him what you mean by the word 'suspect.'

Q. Do you know what I mean by the word 'suspect'?

The Court: If I were a cop on a homicide investigation, everybody is a suspect. I'd rule out nobody. Everybody is a suspect, in my mind.

Now, is that what you mean?

Q. Did you have any reason in your mind at the time to believe that this defendant was connected either directly or indirectly with that homicide which occurred October 4, 1964? Yes or no? A. That's what I wanted to question him about. I concur with the Judge. Everybody is a suspect.

Q. All right. Now, did you have any idea in your mind, sir, that this defendant was possibly connected in one way or other with that homicide? Yes or no? A. Not particularly" (Carroll 84).

At another point in his testimony, Detective Carroll acknowledged that, at the time Morales was apprehended, he (*i.e.*, Carroll) "* * * didn't have anything against him that would definitely pin him to the homicide," and he was dubious about the petitioner being the killer of Addie Brown (*id.* 404-5).

The petitioner's confessions and incidents subsequent thereto

En route to headquarters in the automobile, there was no discussion of the instant homicide (Carroll 417; Daum 462). At the precinct upon arrival about 8:30 p.m., Melvin Morales was taken into an office, after which Carroll went out to get coffee and cake (Carroll 366; Daum 448-9). Daum was the first detective in the precinct to speak about this case with the petitioner (Daum 477), and that incident was described by the former in the following colloquy:

"Q. Did you have any conversation with him pertaining to the incidents of this case? A. Yes, I did.

Q. Tell us what you said to this defendant and what he said to you? A. I informed the defendant Melvin Morales that my name was Detective Donald Daum, and that I was from the Bronx Homicide Squad, and that I was going to ask him some questions pertaining to the lady that had been killed at 700 East 156th Street on October the 4th, and I further stated to him that he need not answer the questions or that any time he wished to have a lawyer, he may have one, and that any answers he did give to me could be held against him, and I could

testify to it in court, and the defendant Melvin Morales stated to me, 'If it's all the same to you, Detective Daum, I would rather talk to Detective Carroll, because I know Detective Carroll, and that was the end of the conversation'' (*id.* 449).

About five minutes after his arrival at the station house and while Daum was standing outside the room, Melvin Morales talked to Detective Aubrey Ferguson—who knew petitioner since he was a "little boy" and who was aware of his criminal record—and, in response to that officer's inquiry, the petitioner denied that he had done "it" (Ferguson 721-2, 731-4, 1113). Morales went on to describe his actions at the critical time, which account included an assertion that he had been in the bathroom of his mother's apartment when the police arrived (*id.* 722, 737). After at most ten minutes of conversation, Ferguson left for the Morales' home hoping to find loopholes in petitioner's story and to ask Mrs. Morales why she had told him that she never saw the petitioner (*id.* 737-8, 1114).

Detective Carroll returned, spoke with Daum, and then to Morales with no one else present, which discussion commenced about 8:45 p.m. and took place while the principals were having coffee and cake (Carroll 366, 385-6; Daum 450).

Their interlocution, which lasted until about 9:00 p.m., was elicited at trial:

"Q. What did he say to you and then what did you say to him? A. Well, the defendant said to me, he said 'You know, Carroll, I can't take a beating.

Q. What did you say? A. I said to him 'Nobody will lay a hand on you' I said 'Stop making alibis.' I said 'You're building crutches to lean upon and fences to hide behind' and I said to him 'There is only one thing you can't do, you can't lie to yourself.' And I said to him 'You can't lie to God' and I said to him 'Do you believe in God,' and he said 'Yes, I do.' Then I said to him 'Well, between you and your God, did you do this thing?' And he said 'Yes, I did' and I said to him 'Well, how would you feel to have somebody do that to your mother?' and he said 'Oh, God, no' and then I said to him 'Well, I am not here to judge you,' I said 'You know you are entitled to a lawyer, you don't have to tell me anything and anything you do tell me may later be used against you.' But you were there and I was not. Do you want to tell me exactly what happened?' and he said 'Yes' and then he recounted what had happened.

Q. Tell us what he said. A. Well he told me that on October 4th, early in the morning he was sitting on a bench in front of his mother's house. I asked him what time it was and he said he didn't remember the time. He said he was sitting on the bench and that he needed a fix. He said he was sick and that he saw this woman come along and she started into the building, and he said he followed her into the building and that she entered the elevator and he entered the elevator.

He said that she pushed the button, and that the elevator statrted up. He says he doesn't know what floor; he didn't know what floor she had pushed. That he said he grabbed her pocketbook. He said that she started to fight with him; and that he had a knife fixed to his arm,

to his right arm by a rubber band; and that he made a motion with his hand whereby the knife came down into his grasp; and that he started to stab her.

And he said she kept hollering, and she said, 'Oh God. Stop it.' And he said she kept hollering, and he kept stabbing her.

He said that he got the pocketbook, the elevator stopped, and that he ran out of the elevator, and he ran down a stairwell, and he skipped stairs while running; that he ran out onto Jackson Avenue, underneath the el; and that he ran down to about 149th Street.

He said that later he went to Brook Avenue, and he copped two three-dollar bags; that he took a shot.

He said that later he returned home. He said that he had thrown the knife in a sewer, and he had discarded the bag in a basket, a Department of Sanitation basket'' (Carroll 366-82; 178-82H).

Thereupon, Carroll called Detective Daum into the room, and then Morales was told by Daum that he would be asked to repeat his story several times by different persons, after which Carroll suggested that the petitioner write out his own statement (Peo.'s Exhs. 8 and 8a; 370-1, 1308-10) so that no one could change it—a suggestion with which the petitioner complied beginning at 9:05 p.m. (Carroll 212-25H, 368-9; Daum 451-2). The contents of the handwritten confession by Morales were substantially identical with the statements attributed to him by Carroll: it was witnessed by the two detectives and signed by the petitioner

after which he wrote, "This is true between me and God" (*ibid.*).

After the handwritten statement had been completed and while the petitioner and the detectives were having more coffee, Carroll made a comment to Morales about the number of times the deceased had been stabbed, which prompted the petitioner to remark, " 'She wouldn't stop hollering' " (Carroll 372; Daum 452). Whereupon, Morales pantomimed the fatal attack, showing how the victim kept turning and remarking that "* * * when she kept turning he stabbed her everywhere she turned" (*ibid.*).

Asked for any other conversation with Morales at that time, Carroll responded as follows:

> "I started [*sic*] to him that he said he had been up in the house, in his mother's house. And he said he was. He had been looking at T.V. And he said that his mother, and I believe his sister-in-law, had been present and that they had gone to bed. And that after the mother had gone to bed and had fallen asleep, that it was at that time that he had left the apartment, and that he had fixed the door so that he could get back in. And that he had gone downstairs and had sat on the bench" (Carroll 372-3; Daum 452-3).

Also significant on this score is the testimony of a defense witness that it was possible to adjust the lock on the door to the Morales' apartment so that it could be opened from the outside without a key (Y. Morales 864-6).

Meanwhile, Detective Ferguson had phoned headquarters from the Morales' apartment, learned of the confession to Detective Carroll, and returned to the precinct

(Ferguson 723, 743). Ferguson then had a second conversation with the petitioner who now admitted his guilt of the relevant crime and gave details, after which Ferguson left the station house before the arrival of Detective Durkin and before 11:00 p.m. (*id.* 723-5, 742, 1113-4). Incidentally, a defense witness testified in rebuttal that Ferguson had been in the Morales' apartment until nearly 11:00 p.m. (Hinds 1138-9).

After the discourse with Detective Carroll aforesaid, Durkin and Golly heard the petitioner confess in detail to the crime he had committed, and they testified at trial to that fact. However, the record indicates that these witnesses were talking basically about the same occurrences, and, indeed Golly placed Durkin in the pertinent room at times when significant admissions were uttered (Golly 589-93).

Furthermore, both detectives agreed that the questioning was intermittent and that the time period under discussion ran from about 11:00 or 11:15 p.m. until 12:15 or 12:30 a.m. (Durkin 530, 551-2; Golly 628-9). Similarly, both recalled that, before Morales confessed in their presence, he (*i.e.*, the petitioner) acknowledged having been apprised of his rights and stated that he did not want the assistance of an attorney (Durkin 497-8; Golly 589, 652-6). As Golly recalled the incident, Morales told his story at the request of Carroll; but both detectives Durkin and Golly thereafter asked questions of Morales (Golly 589).

Also, both of the witnesses being discussed voiced substantially identical versions of what Morales had said (Durkin 498-500; Golly 589-91). According to the witness

Durkin, the petitioner Melvin Morales had completed a full confession within twenty minutes to one-half hour after the two of them began to converse that night and later Durkin again "went over" the oral statement with Morales (Durkin 551-2). Thereafter, Durkin went out and later returned with hamburgers and coffee, after which he talked apparently about other matters with Morales until the arrival of an assistant district attorney (*ibid.*). Golly also had a recollection of the fact that Morales was eating at the pertinent time (Golly 589).

During the episode just described, the petitioner gave some additional particulars about his activities not previously mentioned by him.

For one thing, he asserted that the homicidal act had netted him some eight or nine dollars from the victim's purse (Durkin 497-500; Golly 591). Additionally, Durkin recalled Morales saying that the lethal weapon had a black handle; while Golly recalled the petitioner's describing it as a lock-knife with a five-inch blade (Durkin 522; Golly 595-7). Incidentally in that connection, the record contains descriptions of unsuccessful police efforts to recover that implement, both by having people from another agency search the sewer referred to and later pointed out by Morales, and by executing a search warrant at the home of petitioner's mother (Durkin 506-9, 521-3, 557-61; Golly 600-4, 633).

Also, the petitioner Melvin Morales said that he had disposed of the shoes he had worn during the untoward incident, after which he purchased others at a particular store, and that, two days after the attack, he put the suit

he had worn during the fatal assault into a certain cleaning establishment (Durkin 499-500, 507, 557-61; Golly 595-7, 632-3, 637). Subsequent efforts failed to locate the shoes or verify the purchase of a new pair; however, a suit (People's Exh. 13; 718, 1311) free of bloodstains was surrendered by a female employee of a dry-cleaning shop to a police officer upon presentation of a receipt which had been found in the petitioner's wallet, and, when asked, that lady informed the officer that she had not seen blood stains on the suit before it had been dry-cleaned (Durkin 499-500, 507, 577-61, 504-6; Golly 595-7, 632-3, 637; Lenahan 714-20; M. Morales 927).

On the subject of his wearing apparel, Morales at trial admitted having discarded a pair of shoes and having had his only suit dry-cleaned on October 5th, but he explained that the shoes had been beyond repair and that the suit had needed a cleaning (M. Morales 894-6).

Assistant District Attorney Seymour Rotker arrived at the precinct somewhere between 12:35 and 12:45 a.m., on October 14th with a stenographer named Irwin Wasserman in order to interrogate the petitioner in accordance with the practice followed by the Bronx District Attorney's Office in felony cases (Rotker 671-81). Mr. Rotker had a conference with Detective Durkin, was shown a handwritten confession by Morales, and spoke to the petitioner about this case prior to the formal interrogation which was stenographically recorded (Durkin 553; Rotker 682-3). The colloquy copied down by the stenographer commenced at 1:00 a.m., and it lasted at least ten minutes and no more than thirty minutes according to the estimates given by the witnesses (Durkin 555; Golly 599; Rotker 685, 695).

Present at that time were Messrs. Durkin, Golly, Rotker and Wasserman, but only the assistant district attorney and the petitioner spoke in that interval (Wasserman 1122-4; Rotker 1126-7). At the outset of that interrogation, the petitioner gave affirmative answers when asked if he knew that his statement could be used against him and if he had previously been advised of his rights by police officers, and, also, he stated that the officers had given him a hamburger and tea with milk (Rotker 674). The questioning period under discussion resulted in a full confession by Melvin Morales (*id.* 673-7).

According to Mr. Rotker, he used no force or duress to elicit the inculpatory utterances from the petitioner; he saw nothing unusual about Morales' hands or face; and the petitioner Morales did not complain of police brutality to him (*id.* 101-2H, 689). In that regard, it may be noted at this juncture that various police officers testified that the petitioner had been given food and drink and that no force or duress had been employed to elicit confessions from Morales (Golly 33-4H; Daum 43-4H, 486, 1043-6; Durkin 60-1H; Carroll 78-9H, 431; Pepe 1104-6; see Smith 93-6H, 1117-9). Assistant District Attorney Rotker averred further that the petitioner had not been sick when he questioned him; that he had been unaware—apparently until the day he testified at the voluntariness hearing—that Morales had been taken to the hospital sometime after that interrogation; and that he did not know the reason for that hospital visit (Rotker 107-8H).

At about 1:30 a.m. on October 14th, the petitioner Morales was taken to the scene, where he reenacted the crime (Durkin 503-4; Golly 587, 599-600).

At police headquarters about 3:35 a.m., a patrolman was assigned alone to take the petitioner to Morrisania Hospital and back to the precinct (Wilkie 1049-55). At the hospital at about 4:00 a.m. on October 14th, a doctor diagnosed the petitioner Morales' condition as withdrawal effect, "which means some signs of drug addiction;" injected Morales with a calming agent, and did not treat the petitioner for any other ailment (Solomon 1086-90).

Prior to his arraignment later that day, nude photographs of the petitioner were taken by the police (Durkin 664; M. Morales 970; Peo.'s Exhs. 15 through 19; 970, 1314-22).

A Correction Officer assigned to the Criminal Court of the City of New York, County of Bronx, who interviewed Morales after his arraignment testified that, according to his records, the petitioner had stated that he was sick from drugs when the witness asked him about his physical condition (Smith 93-100H, 1117-9).

On October 20, 1964 Detectives Durkin and Carroll went to see the petitioner in the Bronx County Jail with a view towards finding out if Morales had made a mistake about where he had thrown the murder weapon (Durkin 655, 659). Morales, who had been assigned counsel at the arraignment, told those officers that he had been advised not to speak to them, after which Morales then said, " 'I am going to fight this thing' " (*id.* 655-62).

The balance of petitioner's version of relevant events

The petitioner Melvin Morales, who had not testified at the voluntariness hearing, took the stand on his own behalf at trial and testified that he was thirty years of age; that he had been a narcotics addict for thirteen years and supported his habit by shoplifting or "hustling" when not working; and that he had numerous previous convictions for policy and possession of narcotics (M. Morales 883-4, 896-8).

While in the automobile en route to the station house after the petitioner's arrest, Detective Daum hit Morales —"a slight-of-hand"—and called him a "son-of-a-bitch" (*id.* 914-5).

In the precinct house, a man called "Lieutenant" by the other officers informed the petitioner that " '* * * all we want you to do is sign this paper * * *' " (*id.* 916-7). After the petitioner had voiced a refusal to comply, Daum threatened him and cursed at him (*id.* 917). Whereupon, Morales rose, raised his hand, and said, " 'You have to kill me first,' " which prompted the "Lieutenant" to comment, " 'We'll do that, too' " (*ibid.*).

Respecting that incident, it may be observed now that the lieutenant commanding the 42nd Squad at the time critical herein testified that he was off duty and not in the precinct during the interrogation of Morales, and that his next-in-command, a sergeant, testified that he did not refer to himself as a "Lieutenant;" that he did not remember anyone calling him by that title on the critical night;

and that he had not said to Morales that " ' we may kill you' " (Norton 1099-1101; Pepe 1104-6).

Returning to petitioner's narrative, he averred further that, after the threat to kill him already described, Carroll and Ferguson spoke to him, and, during that conversation, Ferguson stated that nothing would happen to the petitioner who was insisting that he was innocent (M. Morales 917-8). Apparently around that time, Morales made some sort of statement, a copy of which was viewed as unsatisfactory and torn up by the "Lieutenant" (*id.* 918). Next, Daum kicked the petitioner on the thigh, and Carroll suggested that he would provide Morales with narcotics, after which the petitioner was left alone in the room for a while (*id.* 919-20).

Subsequently, Daum reentered and asked Morales, who was beginning to have withdrawal symptoms, if he was ready to sign, after which that officer hit the petitioner on the back a number of times with a blackjack and threatened him further (*id.* 920). Then a Negro detective—called something like the "non-bruise kid" by an associate—entered the room, ripped the petitioner's shirt apparently in an effort to be sure the petitioner had not been scratched, and then left (*ibid.*). Also, an officer who appeared to be Spanish came in and, after Morales had told him that he refused to sign anything, that person said, " 'Well, I can make you talk. * * * I will give you some truth serum up your nuts and kick your nuts' "—a threat which made the petitioner fear that he would be disfigured (*id.* 921).

Soon thereafter, Carroll and Daum unsuccessfully attempted to persuade the petitioner to sign a statement by

promising him that they would plead him to temporary insanity; that all he would get would be one year; and that it would not be on his record (*id.* 921-2). That recalcitrance led to Daum's again striking Morales with the blackjack (*ibid.*).

Further discussion ensued and further assurances that he need not worry were given to Morales, who was then suffering from cramps and whose thoughts were confined to the blackjack assaults and the threat to kick him in the private parts (*id.* 922). About that time, Ferguson came in with a piece of paper and told the petitioner they would tell him what to write and how to spell the words (*id.* 922-3). Then, Morales wrote out a statement, writing what he was told to by Carroll, who helped him with the spelling (*id.* 923). When the petitioner had finished "* * * everybody came and started jumping around and congratulating each other" (*ibid.*). Morales was of the opinion that he had signed the confession two or three hours after entering the precinct (*id.* 925).

Additionally, the petitioner asserted, in substance, that, during his interrogation by the assistant district attorney, he responded as directed by somebody, but he was uncertain as to whether those directions were issued before or during the pertinent interrogation (*id.* 940-3, 1005-16). Later he was taken to the scene, where the officers conjectured about the manner in which the crime had been committed (*id.* 943-6).

Thereafter, the petitioner was taken back to the precinct, and, still later, he was taken by four patrolmen to a hospital where he was given an injection (*id.* 946-7).

Later that day, the petitioner Morales was taken downtown to the police photography laboratory, at which location photographs of him in the nude were taken (*id.* 948).

Several days later, according to Melvin Morales, Detectives Carroll and Durkin visited him at Bronx County Jail, and, although prison authorities had informed him that he did not have to see them, the petitioner decided to do so hoping that they might have found the true culprit (*id.* 949). The officers asked him about a knife and some shoes, after which they claimed to have found the shoes discarded by Morales on 174th Street, which allegation prompted the petitioner to brand the speaker as a liar (*id.* 950-1).

Finally, Melvin Morales swore that he had not killed Addie Brown (*id.* 952-3).

Among other matters, it was brought out on cross-examination that Morales had graduated from Junior High School and had gone to trade school in New York City (*id.* 954-8). The petitioner also acknowledged that nude photographs of his person (Peo.'s Exhs 15 through 19; 970, 1314-22) had been taken on October 14th by the police, and he further agreed when shown one of them (Peo.'s Exh. 19) that no bruises or marks appeared on his body (M. Morales 964, 970; *cf.* 1029, 1031-3). Moreover, Morales acknowledged that he had not complained about police brutality to a number of people he had encountered on October 14th, including the assistant district attorney, people at the hospital, correction officers, the arraignment judge, and the doctor at Bronx County Jail (*id.* 976-81). The petitioner explained that he had been afraid to tell the assistant district

attorney and that the police officers would not let him tell anyone at the hospital (*id.* 976-9). However, he did complain to the court-assigned lawyer who represented him at the arraignment, but the conversation was not completed due to the petitioner's illness (*id.* 979).

On redirect examination, Morales averred, in essence, that there had been funds available in his mother's house at the critical time so that he had not needed to kill for narcotics money (*id.* 1034-6).

C. Decision by the Hearing Court

The trial judge, sitting as a hearing court, found that the voluntariness of the admissions and confessions had been established beyond a reasonable doubt, and he also remarked that the petitioner had not requested counsel and that, in essence, the refusal of the police to permit Mrs. Morales to converse with her son at the relevant time had not been violative of petitioner's constitutional rights (238-44).

Summary of Argument

Petitioner's felony-murder conviction rests primarily upon the proof of his confessions, the voluntariness of which is so clear that argumentation pitched on prevailing standards of due process would avail him nothing. Moreover, his efforts to expand those standards in an unprecedented fashion that would have far reaching effects in our nation must be rejected. Primarily, petitioner Morales seeks to invoke a *per se* exclusionary device, such as that utilized in the case of "tainted" physical evidence obtained dur-

ing an unlawful seizure of a person; but the fact is that the proof herein is sufficient to establish that the detention of the petitioner was lawful within the requirements recently announced by this Court in the so-called "Stop and Frisk" cases. Even if that were not so, the precedents, here and throughout the nation, uniformly hold that exclusion of a confession is not required solely because of an illegal detention; confessions, such as those herein, found on the totality of circumstances to be voluntary are admissible into evidence. Precedents also teach that a change in the law would have prospective application only. Any such change, unlike the usual situation, should not benefit the petitioner because his case happened to be the one chosen for review. For he failed to raise the Fourth Amendment issue in a timely fashion, incidentally depriving the prosecution of an opportunity to meet the claim fairly, or to demonstrate that no such question is really involved herein.

ARGUMENT

The petitioner's confessions were constitutionally admissible into evidence.

The record establishes that the petitioner Melvin Morales readily and repeatedly confessed, even by reenactment, a brutal murder he had committed during the course of robbing a woman, which activity netted him a few dollars for the purchase of narcotics needed to appease his habit temporarily—a plain case of felony murder [former N.Y. Penal Law, §1044, subd. 2].

Needless to say, prosecution evidence respecting the petitioner's confessions—oral, handwritten and gesticulatory—played an integral part in obtaining the conviction of Morales, and, as will be demonstrated below, a negative reply is in order to the question before this Court: whether the admission into evidence of those incriminatory utterances and acts violated petitioner Morales' rights under the Fourth, Fifth or Sixth Amendments. In resolving such claims in the light of the Fourteenth Amendment's guarantee of due process of law, factual resolutions of evidentiary conflicts in state courts are traditionally given substantial effect here, but they, of course, are not binding upon this tribunal [see, *e.g.*, *Clewis* v. *Texas*, 386 U.S. 706, 87 S. Ct. 1338 (1967); *Haynes* v. *Washington*, 373 U.S. 514, 83 S. Ct. 1963 (1963); *Blackburn* v. *Alabama*, 361 U.S. 206, 80 S. Ct. 274 (1960); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 64 S. Ct. 921 (1944)].

In our judgment, the obligation to review the state fact-finding procedures herein may be discharged *viz a viz* petitioner's Fifth and Sixth Amendment claims without any foreseeable difficulty, for the record is relatively complete on that score and because Morales has indicated his willingness to have the pertinent issues resolved on the basis of "only the prosecution version of the facts as representing the totality of circumstances" (brief, p. 34). The Fourth Amendment question may prove a bit troublesome. That is because the New York Court of Appeals, as indicated earlier herein, was the first state tribunal to be confronted with the problem, and it deemed proof incidentally present in this record as sufficient for determining the ultimate question of law. Thus, this discussion

will commence with the plaints other than those addressed to the alleged seizure of petitioner's person. Furthermore, the Fifth-Sixth Amendment contentions must be separately resolved anyway, or at least would be relevant should this Court find a Fourth Amendment violation and yet go on to consider respondent's "attenuation" argument instead of automatically invoking the exclusionary device.

On the subject of voluntariness and of the right to counsel, we feel impelled to remark, prefatorily, that petitioner's abandonment of previously asserted allegations about physical brutality costs him nothing, for a perusal of the record will all but constrain the reader to reject the possibility that the police used such tactics [see *Greenwald v. Wisconsin*, 390 U.S. 519, 521; 88 S.Ct. 1154 (1968)].

Thus, it may be observed that prosecution evidence indicates that Morales was humanely treated at police headquarters and, of course, petitioner's brutality claim was denied under oath by the witnesses Carroll, Damm, Ferguson, Durkin, Rotker, Wasserman, Wilke and Pepe —persons with no discernible motive to commit perjury. Furthermore, the photographic evidence (Peo.'s Exhs. 14-19; 964, 970, 1312-22) bespeaks the falsity of Morales' assertions about having been physically beaten—a truism which even the petitioner acknowledged while on the witness-stand (M. Morales 964, 970; *cf.*, 1029, 1031-3). Over and above that, the relevant proof could have been interpreted by fact-finders as establishing a failure on the petitioner's part to make a prompt outcry about the alleged beatings (M. Morales 976-81; Smith 117-9), with the result that they then were entitled to consider the lack of timely complaint in the

course of assessing Morales' credibility [see *People* v. *Leonti*, 18 N.Y. 2d 384, 390, 275 N.Y. Supp. 2d 825, 222 N.E. 2d 591 (1966); *People* v. *Alex*, 260 N.Y. 425, 428-9, 261 N.Y. Supp. at 260 N.Y. 425, 183 N.E. 906 (1933)].

Understandably reluctant to challenge that proof, the petitioner instead voices arguments which we will demonstrate rely upon inferences unsupportable by the proof, selected portions only of the record, and references to scholarly opinions and writings irrelevant to this case (brief, pp. 28-36).

For example, Morales accuses Detectives Carroll and Daum of pulling "a bit of chicanery" in inducing him to write out a confession (*id.*, pp. 29-30)—clearly hyperbole in the context of the totality of circumstances [see, *e.g.*, *United States ex rel. Everett* v. *Murphy*, 329 F2d 68, 70 (2d Cir. 1964), *cert. denied* 377 U.S. 967, 84 S.Ct. 1648 (1964); *United States ex rel. Caminito* v. *Murphy*, 222 F 2d 698 (2d Cir. 1955), *cert. denied* 350 U.S. 896, 76 S.Ct. 155 (1955); *People* v. *Boone*, 22 N.Y. 2d 476, 483 (1968)].

What there is by way of evidence on this question, hardly enervates the force of the other proof demonstrating the voluntariness of petitioner's declarations. Actually, the detectives being criticized had already heard inculpatory admissions from Morales at the significant time, and no claim was ever made herein to the effect that petitioner executed the holographic statement on the strength of any promise made earlier to him. Indeed, the handwritten confession added little to the weight of prosecution evidence. Beyond that, Daum accurately advised Morales that routine procedures would most likely subject him to

questioning by the heads of the squads investigating the case and also by an assistant district attorney (Carroll 212-25H; 368-9, 437-8; Daum 451-2).. While Carroll's coaxing thereafter stressed protection from altered versions of what petitioner had already said and might later say, that detective's motivation must on this record remain a matter of gross speculation. While on the one hand it may be true that Carroll hoped to strengthen the case against petitioner; on the other hand, that detective might have felt that Morales needed assurances that he would not, for example, be charged with other crimes on the strength of distorted accounts of his remarks (*ibid*).

Another example of unfounded innuendo is petitioner's suggestion (brief, p. 35) that unfair techniques of interrogation were employed by the police in order to extract his confessions [see, *e.g., Greenwald* v *Wisconsin, supra; People* v. *Boone, supra*]. Actually, the lack of causal relationship between the methods of interrogation and the fact that Morales confessed is manifest, as witness the fact that the initial confession occurred very shortly after petitioner's arrival; that it may be readily inferred that Morales surrendered himself with a resolve to confess as a consequence of feelings of compunction, or due to religious beliefs, or for other reasons; and, that questioning following Carroll and Daum's successful efforts—conducted by police squad leaders and an assistant district attorney—was routine follow-up technique employed in Bronx County, at least in serious cases (Carroll 368; Durkin 532; Rotker 671-81).

Another instance of petitioner's overstatements upon which we deem comment somewhat worthwhile concerns

the evidence other than his own allegations on the subject of whether discomforts due to withdrawal from narcotics weakened his determination to avoid confessing. That "issue" was allegedly brought into this case by Morales' own trial testimony and his post-arraignment assertion along the same lines to a correction official (Smith 1117-9). Seemingly, the suggestion being made by petitioner is that the relevant disability became progressively more intense while he was at headquarters, and he purports to find some "credence" for his otherwise unsupported claim in the fact of his 4:00 a.m. hospital visit on October 14th, and in his refusal at the Bronx County Jail on the 20th of the same month to talk to the police about such things as what he had done with the murder weapon.

Contrariwise, however, the record reveals that Morales —who by his own statement from the witness stand could go eight to ten hours without a "shot" during the day and needed none at night (M. Morales 985-9)—showed no signs of suffering as late as the point that he was interrogated by an assistant district attorney (Rotker 107-8H). Moreover, other evidence established that the hospital visit which took place after all the sundry types of confessions had been made by Morales resulted in a diagnosis of "some signs of drug addiction" and treatment by injection of a calming agent (Solomon 1086-90). Such showings obviously militate against petitioner's suggestion. And, as a matter of fact, an "issue" along these lines was presented in the New York Court of Appeals, which tribunal expressly indicated in one opinion that it had examined the totality of the circumstances before resolving the voluntariness question against petitioner [see, *e.g.*, *Com-*

monwealth of Pennsylvania ex rel. Craig v. *Maroney*, 348 F. 2d 22, 26-8 (3d Cir. 1965), *cert. denied* 384 U.S. 1019, 86 S. Ct. 1954 (1965)].

Turning to the other incident, we submit that petitioner's change-of-heart about answering questions for the police displayed by him on October 20th is beyond any doubt too equivocal a circumstance to be of any help to this Court on the voluntariness issue. Suffice it to say by way of illustration that Morales would have it that recalcitrance would also have been his posture *viz a viz* the successful efforts to secure his confession but for the custodial interrogation and narcotics withdrawal factors; while we will hereinafter in discussing this case in the light of the Sixth Amendment suggest that a completely different inference might be drawn much more readily from petitioner's belated decision "to fight this thing." (Durkin 655-62).

Over and beyond the foregoing, there is ample evidence to support the state court finding that the petitioner had been admonished of his rights prior to any interrogation and frequently thereafter (Daum 448-9; Carroll 178-82H, 366-8; Durkin 497-8; Golly 589, 652-6; Rotker 674). While that much is conceded by petitioner (brief, p. 35), he goes on to characterize the failure to mention the availability of assigned counsel to the patently indigent Morales as a weighty factor on the voluntariness issue. But, the members of the New York Court of Appeals sharing Judge Jasen's views considered that circumstance as part of the totality on the voluntariness issue, and otherwise they appear to have followed precedent in this tribunal by explicity holding that suppression of the confession was not

required because the relevant questioning occurred post-*Escobedo* but pre-*Miranda* [*Escobedo* v. *Illinois*, 378 U.S. 478, 84 S. Ct. 1758 (1964); *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966); see *Davis* v. *North Carolina*, 384 U.S. 737, 86 S. Ct. 1761 (1966); *cf. People* v. *Post*, 23 N.Y. 2d 157, 295 N.Y. Supp. 2d 665, 242 N.E. 2d 830 (1968); see also, *Jackson* v. *State*, 4 Cr. L. 2370 (Tenn. Sup. Ct., January 24, 1969].

While the New York Court of Appeals did not specifically treat the subject and petitioner does not directly allege that his right to the assistance of counsel was interfered with, we feel that it would not be amiss at this juncture to illustrate the absence herein of an *Escobedo*—type violation prejudicing petitioner [see, *e.g.*, *People* v. *Baker*, 23 N.Y. Supp. 2d 307, 318-9, 296 N.Y. Supp. 2d 745, 244 N.E. 2d 232 (1968)].

At the outset, we mention a factor equally relevant on the voluntariness question—*viz.*, that Morales was, at the pertinent time, a man approaching thirty years of age who had had several years of trade school training after graduation from Junior High School and who could hardly have been a stranger to police techniques in view of his criminal record (M. Morales 883-4, 896-8, 954-8). Together with the other proof, that circumstance, it seems to us, renders totally irrelevant petitioner's citations of generalizations by courts and writers about the mental states of persons coming "into intimate contact with the police at their base" (brief, pp. 30-32). For the same reason, Morales' claim (*id.*, p. 30) that the detention was the "operative factor" inducing him to confess must be rejected.

Moreover, while he was by his own admission from the witness stand aware at the relevant time that the police had been in touch with his mother in an effort to find him, Morales nevertheless went to her place of business, thereby exposing himself unnecessarily to almost certain apprehension (*id.* 909). Additionally, Morales conceded at trial that he was loosely guarded before reaching headquarters, and the proof as a whole shows that, after arrival there, he confessed readily when approached in terms of his culpability in the eyes of God and following advice about his right to legal assistance—a right he later on expressly declined to exercise (Carroll 172-82H, 367-8; Durkin 497-8; Golly 589, 652-6; M. Morales 915).

Also, the defense produced evidence at the hearing in the form of testimony by Rebecca Morales seemingly to demonstrate that the petitioner was entitled to *Escobedo* protection as a suspect circumstanced in the accusatory stage while detained (R. Morales 111-9H). But, her assertions about the petitioner's agreeing to speak to Carroll and then also agreeing to come to her shop, all but constitute an outright defense concession that the petitioner surrendered himself to interrogation. Indeed, the possibility that a spurious defense tailored to meet *Escobedo* requirements was interposed by Morales and his mother without considering the surrender aspect is suggested by other showings herein; to wit, (1) that Morales' desire to atone for his crime finally dissipated after he was re-acquainted with the realities of prison life and after he had had an opportunity to discuss with an attorney the possible length of incarceration he was facing, and (2) that his mother was perhaps understandably determined to protect any

of her sons (Durkin 655, 659; Ferguson 730-1; L. Morales 880; R. Morales 118-H).

Other details are equally apposite to our present argument. For one thing, no request for an attorney was ever voiced by Melvin Morales. True, the state courts have found that Mrs. Morales was not permitted to talk to petitioner at the time of his detention [see *People* v. *Carbonaro*, 21 N.Y. 2d 271, 278, 287 N.Y. Supp 2d 385, 234 N.E. 2d 433 (1968)—apparently on the strength of the concession by Detective Daum that such a request might have been made (Daum 461; R. Morales 123-6H). Be that as it may, on the record as a whole, and particularly in view of defense testimony that Mrs. Morales had been discussing this case with her petitioner-son from October 4th, there can be no doubt that Morales and his family had more than ample opportunity to obtain legal assistance in any way open to them (R. Morales 114-9H, 144-52H). Moreover, no attorney was sent to the 42nd Precinct by Mrs. Rebecca Morales, who knew that location as the hub of investigatory efforts because of going there to protect her son "Snooky" (L. Morales 880).

Lastly, various facts established herein indicate that the officers who detained the petitioner were in no way seeking to deny him assistance of counsel. In that category, we place Carroll's personal doubts about the guilt of Morales and the advisements about the right to an attorney given petitioner by that detective and his partner Daum, which admonitions were couched in terms of the right being immediate but contained no reference to the availability of such service free of cost—a necessary omis-

sion in a pre-*Miranda* case [Carroll 84-7H, 178-82H, 367-8; 404-5; Daum 449].

We recognize, of course, that our "surrender" argument presupposes the presence herein of more proof on this subject than was apparently found by the members of the New York Court of Appeals who joined in Judge Jasen's opinion, but we take some comfort in the fact that Chief Judge Fuld's pervasive conclusion—that petitioner "waived his constitutional rights"—may properly be interpreted as consistent with the view we now are advancing.

Summing up on petitioner's Fifth-Sixth Amendment arguments, we urge basically that they fly in the face of overwhelming contradictory proof. We submit further that, upon scrutiny, they are readily exposed as essentially no more than a rather ingenious blend of isolated items of proof, unwarranted inferences, and the indiscriminate use of generalities culled from sundry court opinions and scholarly writings which have neither a necessary nor demonstrated relationship to the case of Melvin Morales. Accordingly, there is, we submit, no basis for rejecting the state court resolutions of testimonial conflicts or the conclusions drawn on the voluntariness issue which were consistent from the trial through the Court of Appeals stages.

We come now to the subject of petitioner's Fourth Amendment contentions.

Initially noteworthy is the fact that there has been some uncertainty heretofore about the existence of an

exclusionary rule binding on the states which may be invoked to bar receipt into evidence of a confession elicited from an accused person during an investigatory seizure effected by the authorities without having at the inception thereof satisfied constitutional prerequisites for interfering with the accused's right to privacy and to freedom of movement [see Pitler, "'The Fruit of the Poisonous Tree' Revisited and Shepardized," 56 California L.R. 579, at 589 (1968)]. Speculation began after this Court decided *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1963), wherein, among other things, the confession made by a certain Blackie Toy was declared inadmissible. Thereafter, scholarly opinion emerged to the effect that the conclusion aforesaid really reflected a finding that Blackie Toy's statements had been coerced [see La Fave, "'Street Encounters' and the Constitution: Terry, Sibron, Peters and Beyond," 67 Michigan L.R. 39, 109-114 (1968)]. Moreover, in 1967, this Court declined to pronounce on whether the pertinent *Wong Sun* rule was an expression of the supervisory powers or one of constitutional dimension binding on the states [*Ker Davis v. Texas, supra*, at 711 (n.7); *compare Traub v. Connecticut*, 374 U.S. 493, 83 S. Ct. 1891 (1967)]. On March 10, 1969, this Court made it clear that it had indeed acted in the light of the constitutional prescription against illegal seizures of the person when it ordered suppression of Blackie Toy's confession [*Ulbricht v. United States*, 394 U.S. 165, 178, 89 S. Ct. 961, (1969)].

Presently, the petitioner Morales would seemingly have this Court announce that due process of law requires invoking a *per se* exclusionary device whenever evidence was

secured from an accused during an investigative detention not justified at inception by cause sufficient to warrant arrest (brief, pp. 11-21). The supporting argument runs, in essence, along the lines that it is a "fairly common police practice" to make the "roundup or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge," with the result that only the exclusionary sanction will compel respect from law enforcement officials for the individual's constitutional right to privacy. As we have seen, the New York Court of Appeals members, excepting one, anticipated this tribunal and balanced individual versus societal rights in concluding that, in the case of crimes posing a serious threat to public safety, a person may be detained for questioning on the basis of "reasonable suspicion" provided all other constitutional imperatives were obeyed; and all members of that tribunal, either implicitly or explicitly, decried and condemned unreasonable seizures of the citizenry at large by the authorities. Thereafter, this Court, also using a balancing approach, approved the police activity known as "Stop and Frisk" under certain circumstances [*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968); *Sibron v. New York* and *Peters v. New York*, 392 U.S. 40, 88 S. Ct. 1889 (1968)]. True, the cited cases involved police conduct set against a backdrop of "rapidly unfolding and often dangerous situations on city streets" [*Terry v. Ohio*, *supra* at 10], but that trilogy has clearly charted the basic approach to the solution of all new problems concerning the admissibility of evidence secured during a period of detention which was not preceded by the acquisition of probable cause to effect an arrest.

If, then, it were to be assumed herein that Morales did not surrender himself for questioning and that there was

not sufficient probable cause to arrest him formally, the problem would be whether the seizure of his person was reasonable as required by the Fourth Amendment. Moreover, an affirmative reply to that inquiry depends initially upon a finding by this Court that such an intrusion is reasonably justified because the public need outweighs the constitutional guarantee of individual privacy. Assuming such a finding, it depends further upon a demonstrated justification by the police for the detention of Morales in the form of specific and articulable facts, together with rational inferences from those facts, and those facts must pass muster under an objective standard: to wit, would they "warrant a man of reasonable caution in the belief that the action taken was appropriate?" [*Terry* v. *Ohio*, *supra* at 21-22].

Focusing on the governmental interest in connection with the broad constitutional question, the seriousness of the American crime problem cannot be exaggerated. Concern about that threat not only to the personal safety of the citizenry but also to the rule of law itself has often been expressed of late in this decade, as for example in the report on crime issued during the Presidential tenure of Lyndon B. Johnson ["The Challenge of Crime in a Free Society," A Report by the President's Commission on Law Enforcement and Administration of Justice (1967)], in Congressional enactment of the Omnibus Crime Control and Safe Streets Act of 1968 [P.L. 90-351, 82 STAT 197], and in the organized crime message submitted by President Richard M. Nixon to the Congress on April 23rd of this year [115 Congressional Record H 2949]. Despite unsettled efforts to combat the incidence of crime, such unlawful activity continues to soar at an unprecedented

rate out of all proportion with population growth [see Appendix for latest Federal Bureau of Investigation statistics, and also graphs depicting crime picture which have been reproduced from that organization's publication "Crime in the United States: Uniform Crime Reports 1967"].

Some eight years ago this Court in an opinion upon which Judge Jones relied heavily approbated recent [illegible] the Fifth and Fourteenth Amendments state detention of a suspect for questioning free of coercion [*Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860 (1961)]. In the course of his remarks in that opinion (handed down on the same day as the celebrated Fourth Amendment decision of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961)] Mr. Justice Frankfurter expressed some truisms which are equally valid today:

> "Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there is no one to be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be halted before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.
>
> The questions which these suspected witnesses are asked may serve to clear them. They may serve, directly or indirectly, to lead the police to other suspects than the persons questioned. Or they may become the means by which the persons questioned are themselves led to furnish proofs which will eventually send them to prison or death. In any event,

whatever its outcome, such questioning is often indispensable to crime detection. Its compelling necessity has been judicially recognized as its sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths" [*Culombe* v. *Connecticut*, *supra* at 571-2].

Manifestly if police investigatory powers were to be limited in the fashion requested by petitioner, the unsolved crime rate would increase appreciably, to say the least. Hence, the governmental interest is clearer than ever before in our history.

Another factor tipping the scales in favor of societal interests is the circumstance that expanded due process protections, such as those provided by *Escobedo* and *Miranda*, today attach during periods of custodial interrogation, which limitations when honored insulate the suspect from police over reaching. Moreover, little impetus to the policy of deterrence would be added by an extension of the exclusionary rule to the limited factual context herein involved—a setting markedly less in need of sanctions than most search and seizure situations. The true evil—wanton harassment of the population—is ordinarily outside the reach of the exclusionary sanction, at least in our view.

Seemingly, treatment of an illegally seized suspect in the constitutionally mandated manner for the balance of the period of detention is conduct inconsistent with dragnet or roundup arrest. For, it taxes our credulity to believe that there is a widespread practice in our nation wherein the authorities whisk residents off the streets and into police stations indiscriminately in hopes of obtaining a

confession to a crime and, inconsistently, thereafter scrupulously observe all other constitutional rights of the individuals interrogated—a surmise not rebuttable on the instant record [*cf. Culombe* v. *Connecticut*, *supra* at 572-3]. True, the dragnet technique may be on occasions utilized in some communities, but as a practical matter that evil is called to the attention of the courts by a motion to suppress the evidentiary fruits of such an unconscionable transgression. Generally, those fruits are tangible items which are subject to the exclusionary device because of the illegal arrest, as emphasized by a recent pronouncement by this Court that could almost be termed a civil rights declaration [*Davis* v. *Mississippi*, 394 U. S. 721, 89 S. Ct. 1394, 1397 (1969)]. Where, however, such oppressive conduct results in someone's confessing, due process requirements will bar receipt into evidence of the incriminatory statement. Contrary to petitioner's contention, incidentally, this case does not present an adequate vehicle to pass upon constitutional questions emanating from arrests on open charges or for generally suspicious conduct, actions alien to New York's jurisprudence [see N.Y. Code Crim. Proc., § 177].

Repeating, roundups and dragnets of members of our populace must be condemned, but all such abuses, however, are not carried on with criminal prosecution in mind [*Terry* v. *Ohio*, *supra* at 14 (n.9)]. Where such is the purpose, that activity, it seems to us, constitutes a proscribed "general search," to use the terminology of the Fourth Amendment opinions.

Judge Jasen noted, properly in our judgment, that no dragnet problem is presented herein. A precise definition of such misconduct has yet to be drawn, but, as we see it, the number of people detained is not the sole criterion.

for each of them may have had a nexus in time, space, etc., with the crime. As for those persons detained in this case other than the petitioner Morales, the record showings, although sparse, preclude a finding that any of them was the victim of a roundup as we are using the term.[3]

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3. We now treat these incidents *seriatim*:

(A) The man called "Shorty," according to information obtained by the police shortly after the murder, had had a fight with a woman earlier that night in a bar—one apparently nearby in view of the investigating detective's ability to check out that lead and return while investigation at the scene was still in progress (Texeira 1063). While that officer testified that he had brought "Shorty" to headquarters (*ibid.*), the record is silent as to whether there was consent to be interrogated for the brief period that was seemingly involved.

(B) Augusto ("Snooky") Morales was discovered in the hallway on the thirteenth floor at just about the time Addie Brown was being pronounced dead some two floors below (Carr 320; Covello 352-3; A. Morales 153-411). There is no dispute that Augusto was asked to view the corpse and questioned at the scene, but the record is nebulous on the subject of the length of his detention (A. Morales 153-511; Texeira 1058; Black 1067). In any event, Augusto Morales was detained only until his alibi could be verified at about 2:00 p.m. on October 4th (Durkin 67-70H; A. Morales 150-71H; R. Morales 147H).

(C) Respecting the other members of the Morales family who went to police headquarters, the record is contradictory on the question of whether they went there at their own insistence as they all testified (R. Morales 147H, 801; L. Morales 880; T. Morales 859; *compare* Texeira 1058; Black 1067). Be that as it may, there is no indication therein that any of them was a suspect or ever questioned, except for the musician, Leon Morales, who it seems was asked to explain then and there his 5:00 a.m. arrival home (Texeira 1058).

(D) The record reveals that the two women who last saw the deceased alive and later became prosecution witnesses were interviewed at the station house (Durkin 668-9). No indication that those ladies were detained against their will is to be found in the record.

(E) One detective testified that, during the course of the investigation, "we rounded up several narcotics users" (Ferguson 732). Perused in context, however, the relevant portion of that officer's testimony indicates he used a colloquialism and that no more had been done than ascertain from known addicts in street conversations something that interrupted the efforts to locate the petitioner (*id.* 732-3).

Perforce, a person claiming to be aggrieved by a dragnet arrest or any other type of illegal seizure must himself have been a victim in order to have standing to complain [see, *e.g. Alderman* v. *United States*, *supra*]. Stated differently, a person detained on a constitutionally sufficient basis may not ever vicariously invoke the exclusionary rule because of invasions of the rights of others. The petitioner Morales, as we shall soon demonstrate, would lack the necessary "standing" even if it were to be assumed that the privacy right of others was infringed during investigation of this case.

Before summing up on this subject, we also wish to note that the majority of the New York Court of Appeals, quite correctly in our view and notwithstanding the patently unpersuasive retorts by Morales (brief, pp. 15-16), pointed out that there is no practical alternative to police interrogation circumscribed by due process safeguards.

In sum on this phase of the case, intrusions on the constitutionally guaranteed right to privacy are serious infringements upon the rights of individual citizens. Despite petitioner's efforts (*id.* 26-7) to lump together tangible evidence and confessions obtained during such invasions of rights by a "simple paraphrase" of language in *Byanum* v. *United States*, 262 F. 2d 465 (D.C. Cir. 1958), different considerations control. The seizure of physical evidence by effecting illegal arrests has long been denounced as unconstitutional. But, the requirements of public safety, and other considerations as well, dictate that the constitutionality of an investigative seizure of a person for interrogation about a crime already committed should be determined on

the basis of reasonableness rather than the probable cause to arrest standard. By the way, while the New York Court of Appeals would have limited such an intrusion to the case of serious crimes, we do not urge that argument: one reason being our interpretation of later remarks by this Court on a related subject [*Terry* v. *Ohio*, *supra* at 18 (n. 15)].

Now, we come to the specific case of the petitioner Melvin Morales. There is, in our judgment, sufficient relavant proof presently in the resord to conclude that the intrusion—if there was one—upon the pertinent rights of the petitioner for the purpose of interrogating him about the Addie Brown murder was reasonable within the *Terry* requirements. Before demonstrating our point, we digress momentarily to repeat that many unidentified persons were interrogated during the investigatory efforts herein (Carroll 362; Durkin 568, 668-9; Golly 586; Ferguson 745), and that the sum total of information they gave the officers working on this case does not appear now because the Fourth Amendment claim was untimely voiced. For the same reason, the prosecution has also not had an opportunity to present all the evidence that might be available on the question of whether petitioner surrendered himself for interrogation—an occurrence which would have constituted a waiver of rights or, more aptly perhaps, have prevented Fourth Amendment protection from attaching. Accordingly and also because the prosecution has at no time conceded an absence of probable cause to arrest the petitioner, we feel duty-bound to request that, in the event that this Court finds the Fourth Amendment question properly presented and also rejects all respondent's arguments herein, the matter be remitted to the state jurisdiction for

the taking of additional proof on the two issues aforesaid.

Getting back to our theme and assuming, *arguendo*, the absence of a surrender, it is clear that the petitioner Morales' appearance at the precinct was in no way occasioned by a dragnet or roundup but rather resulted from painstaking police investigation over a period of approximately nine days, which effort began to focus on Morales several days before his investigative seizure. On that subject, petitioner, it appears, would limit this Court to a consideration only of the quantum of relevant factual data possessed by Detective Carroll and that officer's subjective beliefs about Morales' culpability at the inception of the seizure (brief, pp. 13-15). While such limitations might apply in a different context, such as a "'Stop and Frisk'' case, they are beyond doubt inapplicable in the present setting. Here, the proof reveals that numerous detgctives and detective squads concerted their efforts over a span of time, during which period investigating officers exchanged relevant information (Carroll 362, see 394-5; Daum 445, 453; Durkin 488, 524-5, 568, 668-9; Golly 585-6; Ferguson 740, 745). Under such circumstances, it seems to us, the aggregate of police information which led to the decision to make the seizure is the proper circumstance to be considered [see *Lee* v. *United States*, 376 F.2d 100 (9th Cir. 1967); *Smith* v. *United States*, 358 F.2d 835 (D.C. Cir. 1965); *Williams* v. *United States*, 308 F.2d 326 (D.C. Cir. 1962)]. Furthermore, a perusal of Detective Carroll's relevant testimony (Carroll 84-5H, 404-5) will demonstrate that his uncertainty related not to the status of the petitioner as a person who had knowledge about the perpetration of that crime, but rather

that he entertained reservations about a subject upon which he could not have any certainty—*i.e.*, whether or not Morales was the murderer of Addie Brown.

Respecting the aggregate knowledge of the detectives who had a nexus with this case, it is a reasonable inference that the witness who heard the killer flee from the scene and then a door slam some floors below later communicated that information to the police in a discussion on the eleventh floor shortly after that occurrence (Wales 290, 305-10; Durkin 515). Whether that inference may properly be drawn or not, by the eighth day following the criminal homicide, the detectives had been informed by petitioner's mother that her son Melvin had been in her apartment at the time of the fatal assault (Carroll 409-17; Daum 444-8, 455-9). In addition, the petitioner was known to the detectives in question as a narcotics addict with a criminal record who might have been motivated by a craving for drugs to perpetrate the foul deed, and they penetrated the subculture of narcotics addicts just deeply enough to ascertain in street conversations that petitioner was missing from his usual haunts [Carroll 86-7H, 394-5; Durkin 524-5; Golly 617; Ferguson 732; see 740, 745].

While there is no way of knowing for sure on this record, it may also be that, when Mrs. Morales told Detectives Carroll and Daum that the petitioner had been in her apartment at the time critical herein, those officers believed that she had told a different story to Detective Ferguson earlier (see Ferguson 730-1, also 740, 745; *compare* R. Morales 848-9). In any event, Mrs. Morales' delay in informing the police about petitioner's presence in her home was properly

a circumstance to be considered by the authorities in their investigation.

Also not deducible from the record for present purposes is the significance of the information given the authorities by the "young boy," Everett Roberts. That witness gave a description fitting petitioner to some detectives on the Saturday preceding the arrest, and he was called to the precinct apparently to make an identification before Morales was taken for arraignment (Roberts 697-714); *compare* Peo's Exhs. 14-19; 964, 970, 1312-22). Anl, of course, the prosecutor's enigmatic expression, on summation, of limited faith in the reliability of Roberts is an irrelevant circumstance on the detention issue.

Accordingly, it is clear that, prior to the alleged investigative seizure of the petitioner, the police department, as an entity, had information that connected Morales in time and space with the Addie Brown murder; that he was an addict with criminal propensities; that he apparently had gone into hiding after the instant crime; and that his mother had been dilatory in revealing his presence in the apartment at the time of the murder. Such knowledge, in our view, sufficed to draw rational inferences that the petitioner was the killer being sought or that he had information about the identity of the perpetrator of the foul deed, possibly another addict with whom his life had become inextricably intertwined because of their unfortunate community of interest.

Given such circumstances, we further submit, a "reasonably cautious man" would have been warranted in

detaining petitioner for questioning. And, as we have said, the authorities may also have been acting upon an accurate description of petitioner. Thus, petitioner's detention was "reasonable" at inception. We hasten to add, again analogizing to *Terry*, that the "scope of the search" thereafter was likewise "reasonable" because all other constitutional imperatives were obeyed during interrogation of Morales, as we have demonstrated earlier.

Next, we turn to our penultimate argument in this brief; to wit, that even assuming a lack of constitutional basis for seizing Morales, the exclusionary device is not available to him because the primary taint of illegality was dissipated—or the causal link broken—by his freely exercised decision to confess. The validity of such an approach is attested to first of all by this Court's own remarks in *Wong Sun* about the Blackie Toy situation, and further by its determination that the "taint" stemming from the illegal seizure of physical evidence did not extend to the confession of Wong Sun, himself. Incidentally, we deem those considerations controlling, and not the somewhat ambiguous footnote to that opinion now cited by Morales (brief, p. 30). Moreover, the technique uniformly employed by federal and state courts in dealing with the confession-alone-type problem has been the due process approach; and where physical evidence and confessions are obtained, they permit receipt of the statements if attenuated.[4] All

4. See, *e.g.*, *Ewing* v. *United States*, 404 F.2d 625 (10th Cir. 1969); *United States* v. *Hall*, 396 F.2d 841 (4th Cir. 1968), *cert. denied* 393 U.S. 1027, 89 S.Ct. 704 (1969); *United States* v. *Thomas*, 396 F.2d 310 (2nd Cir. 1968); *Baker* v. *United States*, 393 F.2d 604 (9th Cir. 1968), *cert. denied* 393 U.S. 836, 89 S.Ct. 149 (1968); *Leonard* v. *United States*, 391 F.2d 537 (9th Cir. 1968); *Alexander* v. *United States*, 390 F.2d 101 (5th Cir. 1968); *United States* v. *Ruf-*

of that militates against petitioner's plea for a *per se* exclusionary rule *re* the context in which he is circumstanced (brief, pp. 21-28)—as does a note by the draftsmen of the American Law Institute Model Code of Pre-Arraignment Procedure (Tentative Draft No. 1, 1966) which he cites (brief, pp. 23-24). Another authority relied on by Morales (*id.* p. 26) is equally unpersuasive, for the claimed justifications for a *per se* exclusionary rule therein reflect the author's views in the era preceding *Escobedo* and *Miranda* [Broeder, "Wong Sun v. United States: A Study in Faith and Hope," 42 Nebraska L.R. 483, 485, 564- 578 (1963)].

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fin, 389 F.2d 76 (7th Cir. 1968); *United States* v. *Barhannon*, 388 F.2d 961 (7th Cir. 1968); *United States* v. *Frazier*, 385 F.2d 901 (4th Cir. 1967), *cert. denied* 390 U.S. 997, 88 S.Ct. 1207 (1968); *Hicks* v. *United States*, 382 F.2d 158 (D.C. Cir. 1967); *United States* v. *McGavic*, 337 F.2d 317 (6th Cir. 1965), *cert. denied* 380 U.S. 933, 85 S.Ct. 939 (1965); *Commonwealth of Pennsylvania ex rel. Craig* v. *Maroney*, 348 F.2d 22 (3rd Cir. 1965), *cert. denied* 384 U.S. 1019, 86 S.Ct. 1957 (1966); *Rogers* v. *United States*, 330 F.2d 535 (5th Cir. 1964), *cert. denied* 379 U.S. 916 (1964); *Burke* v. *United States*, 328 F.2d 399 (1st Cir. 1964), *cert. denied* 379 U.S. 849, 85 S. Ct. 143 (1965); *People* v. *Johnson*, 75 Cal. R. 401, 450 P.2d 865 (1969); *People* v. *Harris*, 105 Ill. App.2d 305, 245 N.E.2d 80 (1969); *Commonwealth* v. *Brown*, 354 Mass. 246, 237 N.E.2d 53 (1968); *State* v. *Mayes*, 83 Neb. 165, 159 N.W.2d 203 (1968); *Commonwealth* v. *Holton*, 432 Pa. 11, 247 A.2d 228 (1968); *Butina* v. *Maryland*, 4 Md. App. 312, 242 A.2d 819 (1968); *State* v. *Moore*, 275 N.C. 141, 166 S.E.2d 53 (1968); *People* v. *Garner*, 44 Cal. R. 217 (1965); *People* v. *Nieto*, 247 Cal. App.2d 364, *cert. den.* 387 U.S. 911 (1967); *Prescoe* v. *Maryland*, 231 Md. 486, 191 A.2d 226 (1963); *People* v. *Robinson*, 13 N.Y.2d 296, 246 N.Y.S.2d 623, 196 N.E.2d 261 (1963); *Peal* v. *Maryland*, 232 Md. 329, 193 A.2d 53 (1963); cf. *Durham* v. *United States*, 403 F.2d 190 (9th Cir. 1968); *Jones* v. *Warden*, 402 F.2d 777 (5th Cir. 1968); *Phelper* v. *Decker*, 401 F.2d 232 (5th Cir. 1968); *Coberman* v. *Maxwell*, 399 F.2d 662 (6th Cir. 1968); *Parman* v. *United States*, 399 F.2d 559 (D.C. Cir. 1968); *United States* v. *Birns*, 395 F.2d 943 (6th Cir. 1968); *Clay* v. *United States*, 394 F.2d 281 (8th Cir. 1968); *Swinney* v. *United States*, 391 F.2d 190 (5th Cir. 1968); *People* v. *Stoner*, 55 Cal. R. 897, 422 P.2d 585 (1967); *State* v. *Sherrick*, 98 Ariz. 46, 402 P.2d 6 (1965); *People* v. *Bilderbach*, 44 Cal. R. 313, 401 P.2d 921 (1965); *People* v. *Faris*, 47 Cal. R. 370, 407 P.2d 282 (1965).

Closing, we deem it perhaps not entirely without value to comment upon retroactivity in case this Court favors the absolute exclusion of voluntary confessions made during an unlawful period of detention. For one thing, our view is that the past uncertainty respecting the existence and jurisdictional scope of an exclusionary rule militates against viewing *Wong Sun* as the operative date thereof. Secondly, we feel that the considerations ordinarily leading to a prospective application of new doctrines are present in this situation [see *e.g. Desist* v. *United States*, 394 U. S. 244, 89 S.Ct. 1030 (1969); *Kaiser* v. *New York*, 394 U. S. 280, 89 S.Ct. 1044 (1969)]. Lastly, our feeling is that exclusion should not be directed in the instant case due to the failure to raise the pertinent issue in a timely fashion.

Conclusion

The judgment of conviction should be affirmed.

Respectfully submitted,

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August 28, 1969.

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

FOR RELEASE
TUESDAY PM
JUNE 24, 1969

According to figures made available through the FBI's Uniform Crime Reports and released by Attorney General John N. Mitchell, serious crime in the United States continued its upward trend recording a 10 percent rise nationally for the first three months of 1969 when compared to the same period in 1968.

FBI Director J. Edgar Hoover noted that each crime classification used in the national Crime Index showed increases. Crimes of violence as a group recorded a 15 percent increase with murder up 7 percent, forcible rape 12 percent, aggravated assault 8 percent, and robbery 22 percent. Property crimes as a group climbed 9 percent with burglary up 4 percent, larceny $50 and over in value 17 percent, and auto theft 11 percent.

According to the FBI Director, the large cities with over 100,000 inhabitants experienced an average increase of 10 percent, suburban areas 11 percent, and rural areas 7 percent. When viewed by geographic regions, the Northeastern States reported a 12 percent rise, the North Central States were up 10 percent, and the Southern and Western States each registered a 9 percent increase.

The FBI Director called particular attention to the continued sharp increases in the crimes of violence. He pointed out the sharp increases in robbery, which continues to increase at a more rapid pace than the other Crime Index offenses. Nationwide, according to Mr. Hoover, armed robbery where any weapon was used rose 27 percent and aggravated assault with a firearm increased 10 percent during the first quarter of 1969 over the same period in 1968.

A copy of the preliminary figures for the first three months is attached.

Enclosure 1

FOR RELEASE
TUESDAY PM
JUNE 24, 1969

UNIFORM CRIME REPORTING
(January-March, 1969)

Crime, as measured by the Crime Index, increased 10 percent during the first three months of 1969 over the same period in 1968. Increases were registered in each offense category with murder up 7 percent, forcible rape 12 percent, aggravated assault 8 percent, robbery 22 percent, burglary 4 percent, larceny $50 and over in value 17 percent, and auto theft 11 percent. The violent crimes of murder, forcible rape, robbery, and aggravated assault as a group rose 15 percent, while the more voluminous property crimes of burglary, larceny $50 and over in value, and auto theft as a group registered a 9 percent upswing. Cities having 100,000 or more inhabitants experienced an average increase of 10 percent, suburban police agencies reported an 11 percent rise, and rural areas were up 7 percent (Table 1). The four geographic regions reported upward trends in all crime classifications. The Northeastern States reported a 12 percent rise, the North Central States were up 10 percent, and the Southern and Western States each registered a 9 percent increase (Table 2). Robbery again continued to outpace the upward swing of the other Crime Index offenses rising 22 percent. Nationwide, armed robbery where any weapon is used rose 27 percent and made up 64 percent of all robbery offenses.

TABLE 1

CRIME INDEX TRENDS
(January - March, percent change 1969 over 1968, offenses known to the police)

Population Group and Area	Number of Agencies	Population in thousands	Total	Violent	Property	Murder	Forcible rape	Robbery	Aggravated assault	Burglary	Larceny $50 and over	Auto theft
Total all agencies	5,499	160,608	+10	+15	+ 9	+ 7	+12	+22	+ 8	+4	+17	+11
Cities over 25,000	849	88,846	+10	+16	+ 9	+11	+15	+24	+ 6	+5	+15	+11
Suburban area	2,031	47,865	+11	+11	+11	- 2	+ 5	+ 9	+13	+1	+24	+13
Rural area	1,327	20,972	+ 7	+11	+ 7	-17	+11	+13	+ 13	+1	+14	+21
Over 1,000,000	6	19,444	+ 8	+17	+ 6	+ 9	+16	+27	+ 2	+6	+ 5	+ 6
500,000 to 1,000,000	18	11,692	+15	+22	+14	+27	+30	+27	+13	+8	+14	+23
250,000 to 500,000	29	10,331	+ 6	+ 5	+ 6	-13	- 4	+13	- 1	—	+17	+ 7
100,000 to 250,000	95	14,049	+ 9	+ 9	+ 9	+ 6	+ 6	+16	+ 5	+4	+19	+ 6
50,000 to 100,000	249	17,379	+12	+16	+11	+35	+21	+15	+16	+4	+21	+11
25,000 to 50,000	452	15,951	+12	+15	+12	- 1	+ 6	+20	+13	+2	+25	+11
10,000 to 25,000	1,095	17,243	+13	+15	+13	+13	+14	+15	+16	+4	+28	+ 8
Under 10,000	1,966	10,283	+13	+ 8	+13	+ 6	-11	+23	+ 6	+4	+28	+ 9

TABLE 2

CRIME INDEX TRENDS BY GEOGRAPHIC REGION
(January-March, 1969 over 1968)

Region	Total	Violent	Property	Murder	Forcible rape	Robbery	Aggravated assault	Burglary	Larceny $50 and over	Auto theft
Northeastern States	+12	+26	+10	+ 9	+18	+37	+10	+ 7	+15	+10
North Central States	+10	+12	+10	+ 1	+13	+15	+ 8	+4	+19	+ 9
Southern States	+ 9	+ 9	+ 9	+ 6	+ 3	+14	+ 7	+3	+17	+11
Western States	+ 9	+13	+ 9	+17	+16	+19	+ 6	+1	+17	+15

Table 3 below sets forth the first quarter Crime Index trend for the past six years.

TABLE 3

CRIME INDEX TRENDS
(January-March, percent change 1964-1969, each year over previous year)

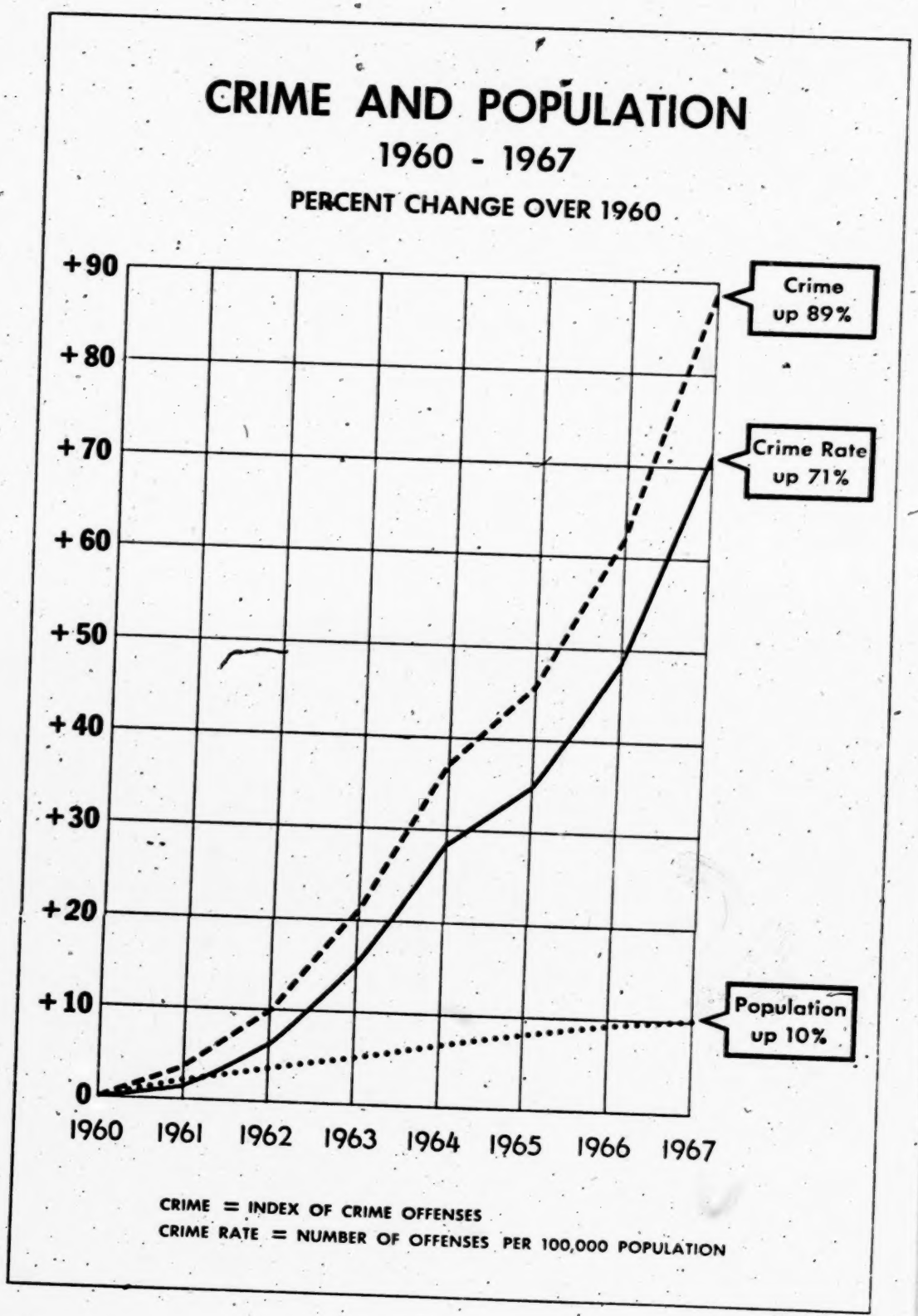
January-March	Total	Murder	Forcible rape	Robbery	Aggravated assault	Burglary	Larceny $50 and over	Auto theft
1964/1963	+19	+17	+ 22	+18	+14	+18	+ 21	+22
1965/1964	+ 2	+ 2	+ 3	+ 1	+ 2	+ 2	+ 4	+ 1
1966/1965	+ 6	+ 4	+ 14	+ 4	+ 9	+ 4	+ 11	+ 5
1967/1966	+20	+23	+ 8	+32	+15	+21	+ 18	+20
1968/1967	+17	+16	+ 19	+24	+13	+15	+ 19	+17
1969/1968	+10	+ 7	+ 12	+22	+ 8	+ 4	+ 17	+11

Issued by John Edgar Hoover, Director, Federal Bureau of Investigation
United States Department of Justice, Washington, D. C. 20535
Advisory: Committee on Uniform Crime Records, International Association of Chiefs of Police

Offenses Known to the Police, January through March, 1968 and 1969
Cities over 100,000 in Population

			Murder, non-negligent man-slaughter	Forcible rape	Robbery	Aggravated assault	Burglary - breaking or entering	Larceny $50 and over	Auto theft
Abilene	Texas	1968	1	2	2	5	176	149	31
		1969		1	2	5	173	133	26
Akron	Ohio	1968	7	18	105	87	210	531	542
		1969	7	20	209	99	603	702	745
Albany	N Y	1968	2	1	16	23	323	87	226
		1969	2	2	36	23	261	93	223
Albuquerque	N Mex	1968		21	64	178	1,037 (1)	886	306
		1969	2	26	88	164	1,375	1,303	1,[illegible]
Alexandria	Va	1968	3	8	16	15	291	240	116
		1969	2	6	49	25	274	277	165
Allentown	Pa	1968			7	12	125	103	45
		1969	1	2	13	21	170	196	36
Amarillo	Texas	1968	2		18	62	241	274	103
		1969		3	11	49	302	254	60
Anaheim	Calif	1968		5	43	27	640	553	130
		1969		10	62	15	634	535	150
Arlington	Va	1968	2	16	40	35	459	371	178
		1969	1	3	28	15	363	428	192
Atlanta	Ga	1968	25	21	198	199	1,695	1,428	775
		1969	35	30	226	206	2,163	1,242	998
Austin	Texas	1968	7	6	40	140	563	242	162
		1969	3	6	49	183	768	601	206
Baltimore	Md	1968	58	152	2,043	1,871	5,749	2,648	2,377
		1969	58	142	2,125	2,129	5,249	2,916	2,329
Baton Rouge	La	1968	5	16	62	104	810	344	191
		1969	6	11	57	77	636	441	252
Beaumont	Texas	1968	6		5	86	312	109	66
		1969	3	3	32	112	405	106	77
Birmingham	Ala	1968	16	18	140	217	1,137	900	418
		1969	16	12	98	201	1,048	1,237	468
Boston	Mass	1968	16	51	406	312	1,478	1,242	3,368
		1969	22	49	770	349	2,420	1,436	3,506
Bridgeport	Conn	1968	2	3	54	35	360	243	320
		1969	2	1	85	38	561	485	440
Buffalo	N Y	1968	8	51	231	139	1,271	838	1,282
		1969	7	28	216	106	1,077	992	831
Camden	N J	1968	1	6	76	37	460	219	350
		1969	4	5	72	45	455	127	393
Canton	Ohio	1968	3	3	35	24	220	208	100
		1969	1	2	38	39	190	231	80
Cedar Rapids	Iowa	1968		1	3	2	126	127	78
		1969	1	2	12	6	108	177	136
Charlotte	N C	1968	13	15	90	491	813	514	172
		1969	6	24	93	511	941	595	244
Chattanooga	Tenn	1968	7	3	78	41	687	109	328
		1969	6	8	89	38	566	107	360
Chicago	Ill	1968	134	245	4,313	2,712	7,986	4,164	7,647
		1969	121	291	4,280	2,453	8,128	4,037	6,175
Cincinnati	Ohio	1968	8	31	206	180	1,184	674	415
		1969	13	39	185	150	1,156	817	372
Cleveland	Ohio	1968	32	38	795	265	2,078	1,240	2,830
		1969	51	74	1,226	300	2,448	2,102	4,901
Colorado Springs	Colo	1968	3	2	38	14	235	180	71
		1969	3	10	50	33	387	366	114
Columbia	S C	1968	8	7	57	97	564	280	187
		1969	7	6	63	93	552	256	245
Columbus	Ga	1968	6	5	10	19	225	183	162
		1969	6	3	33	16	220	128	129
Columbus	Ohio	1968	9	35	247	130	1,650	972	981
		1969	9	51	313	150	1,874	1,442	974
Corpus Christi	Texas	1968		4	34	93	721	417	167
		1969	1	7	32	143	663	476	224
Dallas (1)	Texas	1968							
		1969	55	48	412	946	4,091	1,277	1,746
Dayton	Ohio	1968	16	27	252	151	892	447	530
		1969	10	21	231	165	1,087	399	523
Dearborn	Mich	1968	2	2	26	6	198	191	197
		1969	4	3	31	13	217	342	211
Denver	Colo	1968	8	57	300	251	1,974	1,424	1,282
		1969	11	55	404	321	2,507	2,008	1,341
Des Moines	Iowa	1968	7	9	44	26	348	410	185
		1969		10	60	22	312	438	141
Detroit	Mich	1968	88	226	2,672	1,053	8,584	3,830	3,902
		1969	88	199	3,737	1,020	9,420	4,451	4,841
Duluth	Minn	1968	1		11		252	112	69
		1969		2	18	6	183	161	112
Elizabeth	N J	1968	3	9	31	65	357	113	217
		1969		11	51	62	551	197	330
El Paso	Texas	1968	3	15	70	104	923	365	372
		1969	1	6	55	112	989	516	484
Erie	Pa	1968		4	53	17	269	98	127
		1969		2	22	26	133	85	96
Evansville	Ind	1968	1	5	43	57	413	332	126
		1969	5	9	36	56	389	271	129
Fall River	Mass	1968	1	2	23	12	349	80	134
		1969		1	6	13	343	87	208
Flint	Mich	1968	4	21	92	264	446	537	203
		1969	6	16	146	294	734	837	185
Fort Lauderdale	Fla	1968	4	12	23	41	609	501	208
		1969	5	9	60	62	645	477	317
Fort Wayne	Ind	1968	3	1	53	26	369	460	116
		1969	4	7	35	17	375	502	123
Fort Worth	Texas	1968	23	19	120	150	1,330	490	628
		1969	25	9	202	128	1,552	665	690
Fresno	Calif	1968	2	6	98	39	1,278	613	425
		1969	1	4	95	40	908	838	431
Garden Grove	Calif	1968		4	27	21	350	407	62
		1969	1	4	46	23	451	533	93
Gary	Ind	1968	8	14	230	105	508	364	876
		1969	11	29	160	112	469	460	578
Glendale	Calif	1968		2	26	10	358	325	154
		1969	2	3	27	16	373	440	188
Grand Rapids	Mich	1968	5	12	47	68	643	242	222
		1969	3	15	49	101	692	293	195
Greensboro	N C	1968	2	8	27	205	239	329	101
		1969	6	6	32	206	343	367	135
Hammond	Ind	1968	1	3	42	27	236	238	182
		1969	2	6	44	16	213	239	176
Hampton	Va	1968	4	5	11	16	188	143	55
		1969	2	4	18	17	197	183	47
Hartford	Conn	1968	3	5	58	79	892	368	416
		1969	2	6	116	100	713	601	489
Honolulu	Hawaii	1968	2	5	26	76	1,662	810	1,[illegible]
		1969	1	15	50	20	1,481	1,128	734
Houston	Texas	1968	48	73	1,083	691	4,686	2,249	2,797
		1969	47	68	1,013	668	5,895	2,755	2,359
Huntington Beach	Calif	1968	2	5	12	12	222	258	58
		1969	1	3	21	19	260	352	80
Huntsville	Ala	1968	2	2	13	113	295	353	127
		1969	1	1	14	102	322	263	116
Independence	Mo	1968		1	5	32	146	126	38
		1969		6	6	26	164	146	55
Indianapolis	Ind	1968	11	32	459	116	1,885	987	951
		1969	16	43	438	170	2,176	1,093	1,138
Jackson	Miss	1968	1	1	22	31	344	160	81
		1969	7	6	20	24	300	213	90
Jacksonville	Fla	1968	15	40	387	412	2,475	712	461
		1969	17	34	544	474	2,140	1,116	575
Jersey City	N J	1968	4	7	111	47	225	41	174
		1969	4	5	165	54	451	73	218
Kansas City	Kans	1968	5	12	158	88	732	150	356
		1969	5	16	194	91	.858	220	75
Kansas City	Mo	1968	14	68	692	387	2,634	1,363	881
		1969	17	89	987	368	2,880	1,514	1,538
Knoxville	Tenn	1968	6	4	29	90	528	241	258
		1969	5	1	35	66	460	324	245
Lansing	Mich	1968	2	6	16	36	347	344	155
		1969	1	7	36	47	588	388	210
Las Vegas	Nev	1968	1	5	46	24	344	181	135
		1969	5	5	70	24	423	256	164
Lincoln	Nebr	1968	1	6	4	31	152	297	72
		1969	2	3	1	25	187	148	44
Little Rock	Ark	1968	5	5	75	139	446	471	119
		1969	4	6	61	123	610	747	96
Livonia	Mich	1968		2	9	8	205	190	73
		1969		2	9	17	246	129	68
Long Beach	Calif	1968	10	37	248	140	1,582	1,016	697
		1969	5	43	275	122	1,435	1,199	630
Los Angeles	Calif	1968	68	416	2,740	3,166	16,325	10,076	7,586
		1969	93	488	3,160	3,352	16,604	10,857	6,356
Louisville	Ky	1968	14	27	260	138	1,356	1,147	1,184
		1969	19	14	254	134	1,206	1,371	1,371
Lubbock	Texas	1968		6	6	18	72	553	506
		1969	1	9	13	41	652	444	63
Macon	Ga	1968	8	3	46	31	503	231	74
		1969	8	8	38	34	439	314	140
Madison	Wis	1968		1	10	1	242	244	80
		1969		4	11	4	179	261	101
Memphis	Tenn	1968	17	18	175	139	1,827	902	432
		1969	15	26	309	125	1,999	1,268	453
Miami	Fla	1968	11	40	564	635	2,040	1,101	476
		1969	17	25	658	565	1,876	1,244	752
Milwaukee	Wis	1968	10	19	240	188	1,090	1,314	1,013
		1969	10	22	142	151	1,029	1,416	896
Minneapolis	Minn	1968	11	23	402	136	2,079	986	1,012
		1969	5	20	356	122	1,877	1,049	1,002
Mobile	Ala	1968	4	13	74	141	913	312	176
		1969	10	6	71	137	1,101	423	201
Montgomery	Ala	1968	2	2	24	19	419	330	74
		1969	4	3	42	14	489	368	79
Nashville	Tenn	1968	20	23	195	330	1,402	950	600
		1969	16	24	221	274	1,496	1,088	819
Newark	N J	1968	26	66	759	533	2,889	1,417	1,613
		1969	24	57	1,131	492	3,244	1,421	1,832
New Bedford	Mass	1968		1	31	25	274	136	246
		1969		4	32	23	345	186	325
New Haven	Conn	1968		13	31	74	627	222	462
		1969		19	26	92	739	304	320
New Orleans	La	1968	25	61	592	421	2,242	2,265	1,347
		1969	16	66	574	492	1,990	2,040	1,366
Newport News	Va	1968	4	12	30	62	249	235	101
		1969	6	7	71	71	342	286	94
New York	N Y	1968	212	431	11,119	5,901	41,022	30,059	16,822
		1969	250	536	15,632	6,347	43,450	30,881	18,672
Norfolk	Va	1968	10	19	158	203	1,096	810	439
		1969	11	15	234	197	1,230	922	370
Oakland	Calif	1968	15	36	486	188	2,988	1,361	663
		1969	17	53	871	223	3,780	1,157	1,577
Oklahoma City	Okla	1968	7	25	123	115	1,348	632	347
		1969	6	17	119	152	1,366	230	565
Omaha	Nebr	1968	6	7	103	182	1,023	411	786
		1969	6	17	121	188	780	480	444
Orlando	Fla	1968	5	2	51	111	304	324	118
		1969	5	2	50	88	478	326	84
Pasadena	Calif	1968	2	10	96	76	667	448	217
		1969	2	7	75	89	692	588	236
Paterson	N J	1968	3	3	56	36	370	63	275
		1969	1	7	103	46	458	80	260
Peoria	Ill	1968	1	4	46	52	459	240	109
		1969	2	8	74	77	455	295	120
Philadelphia	Pa	1968	56	108	970	877	3,298	887	1,557
		1969	62	126	1,329	818	3,614	799	1,709
Phoenix	Ariz	1968	18	36	297	336	2,733	1,966	895
		1969	10	30	250	274	2,343	1,534	887
Pittsburgh	Pa	1968	10	39	562	204	2,042	1,790	2,058
		1969	11	53	837	317	2,375	2,046	2,428
Portland	Oreg	1968	7	19	266	176	1,877	1,503	634
		1969	6	24	236	139	1,662	1,508	619
Portsmouth	Va	1968	2	2	53	47	468	230	219
		1969	2	4	63	46	478	210	153
Providence	R I	1968	2	1	76	59	907	275	897
		1969	5		78	66	835	374	887
Pueblo	Colo	1968			9	41	170	184	49
		1969		2	9	23	169	250	68
Raleigh	N C	1968	4	5	27	77	193	299	78
		1969	5	2	24	93	198	342	63
Reading	Pa	1968	2	2	18	9	179	47	54
		1969		6	17	25	150	89	62
Richmond	Va	1968	7	13	156	114	1,041	469	385
		1969	11	16	173	119	971	561	519
Riverside	Calif	1968	2	7	27	62	588	484	185
		1969	1	6	53	66	851	524	213
Roanoke	Va	1968	4	1	40	85	350	230	139
		1969	4	1	33	34	338	189	133
Rochester	N Y	1968	4	8	103	108	883	598	225
		1969	9	16	47	115	663	850	280
Rockford	Ill	1968	2	2	32	18	309	224	108
		1969	1	5	40	22	361	287	131
Sacramento	Calif	1968	3	8	134	80	1,086	728	481
		1969	5	11	137	63	1,021	863	518
Saginaw	Mich	1968	3	7	45	66	191	85	54
		1969	3	2	53	42	263	89	85
St. Louis	Mo	1968	38	85	845	503	3,566	807	1,886
		1969	64	133	1,098	676	4,374	932	2,761
St. Paul	Minn	1968	4	19	171	94	1,528	727	842
		1969	3	11	214	81	1,228	588	785
St. Petersburg	Fla	1968	8	13	143	119	819	461	149
		1969	3	12	108	144	746	443	112
Salt Lake City	Utah	1968	4	6	42	39	788	527	197
		1969	2	4	66	43	770	766	320
San Antonio	Texas	1968	19	31	189	400	2,912	1,611	1,248
		1969	23	34	208	441	2,923	1,810	1,307
San Bernardino	Calif	1968	4	6	55	45	404	861	217
		1969	2	3	64	35	532	676	213
San Diego	Calif	1968	5	15	175	147	1,045	1,982	786
		1969	9	31	180	157	1,232	2,100	804
San Francisco	Calif	1968	20	36	1,184	567	4,150	1,200	3,080
		1969	31	112	1,771	786	4,783	1,432	4,830
San Jose	Calif	1968	2	16	75	93	1,384	291	480
		1969		37	81	93	1,470	561	500
Santa Ana	Calif	1968		7	25	40	587	189	180
		1969	3	4	53	40	496	232	167
Savannah	Ga	1968	4	12	72	65	667	345	149
		1969	2	12	73	78	684	409	124
Scranton	Pa	1968			2	13	114	31	147
		1969			6	22	152	131	113
Shreveport	La	1968	5	6	31	120	411	171	159
		1969	13	1	24	160	416	182	144
South Bend	Ind	1968	1	1	18	16	366	188	182
		1969	2	2	78	24	482	210	137
Spokane	Wash	1968	1	7	42	13	433	185	185
		1969		4	27	10	350	208	109
Springfield	Mass	1968	7	4	44	56	273	351	207
		1969	1	5	35	24	479	328	93
Springfield	Mo	1968	1		3	5	223	142	98
		1969	1		10	13	179	224	39
Syracuse	N Y	1968	1	4	100	63	1,006	866	1[illegible]
		1969	1	8	98	70	668	345	110
Tacoma	Wash	1968		12	35	61	473	316	167
		1969		12	47	66	583	370	223
Tampa	Fla	1968	12	7	229	227	1,907	877	888
		1969	8	11	227	223	1,686	966	888
Toledo	Ohio	1968	10	29	288	107	1,088	889	888
		1969	3	17	184	78	741	813	577
Topeka	Kans	1968	3	4	17	27	240	280	88
		1969	3	4	54	70	313	382	80
Torrance	Calif	1968	1	6	37	18	540	640	179
		1969	1	8	63	18	481	590	401
Trenton	N J	1968	1	3	180	51	547	330	318
		1969	4	8	114	63	544	196	220
Tucson	Ariz	1968	1	12	94	80	788	534	381
		1969	5	6	80	80	687	663	308
Tulsa	Okla	1968	3	19	88	107	983	813	381
		1969			88	100	776	1,008	304
Utica	N Y	1968	3	1	16	6	115	22	27
		1969	1	5	14	1	120	65	85
Virginia Beach	Va	1968	2	4	17	39	280	226	81
		1969	1	3	13	37	271	873	98
Waco	Texas	1968	1	3	13	48	844	158	72
		1969	6	6	15	48	988	340	84
Warren	Mich	1968		2	12	48	420	354	88
		1969		1	22	31	395	410	88
Washington	D C	1968	41	52	1,777	708	4,057	1,947	1,068
		1969	63	77	2,788	707	4,972	2,177	2,690
Waterbury	Conn	1968			18	31	278	138	88
		1969	2	1	41	8	328	218	207
Wichita	Kans	1968	7	34	97	83	845	575	381
		1969	1	11	78	76	776	778	179
Wichita Falls	Texas	1968	3	4	13	34	187	88	54
		1969	4	1	10	37	152	58	29
Winston-Salem	N C	1968	2	7	23	176	581	185	122
		1969	2	5	23	238	613	270	130
Worcester	Mass	1968	1	4	63	35	664	192	720
		1969	1	4	53	18	1,006	252	881
Yonkers	N Y	1968	1	2	53	84	375	340	345
		1969	1	1	54	51	429	493	328
Youngstown	Ohio	1968	2	1	54	60	461	91	254
		1969	5	6	87	55	482	130	241

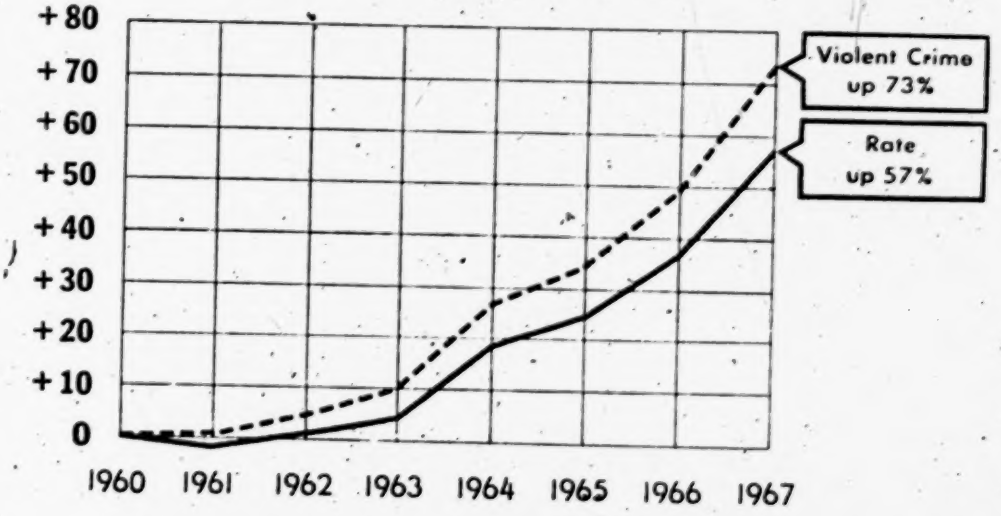
(1) 1968 figures not comparable with 1969, and are not used in trend tabulations. Agency reports which are determined to be influenced by a change in reporting practices, for all or specific offenses, are removed from trend tables.
All 1969 crime figures from reporting units are preliminary. Final figures and crime rates per unit of population are not available until the annual publication. Trends in this report are based on the volume of all crimes reported by comparable units.


CRIME AND POPULATION
1960 - 1967
PERCENT CHANGE OVER 1960
+90
+80
+70
+60
+50
+40
+30
+20
+10
0
1960
1961
1962
1963
1964
1965
1966
1967
Crime up 89%
Crime Rate up 71%
Population up 10%
CRIME = INDEX OF CRIME OFFENSES
CRIME RATE = NUMBER OF OFFENSES PER 100,000 POPULATION
FBI CHART

CRIMES OF VIOLENCE

1960 - 1967

PERCENT CHANGE OVER 1960



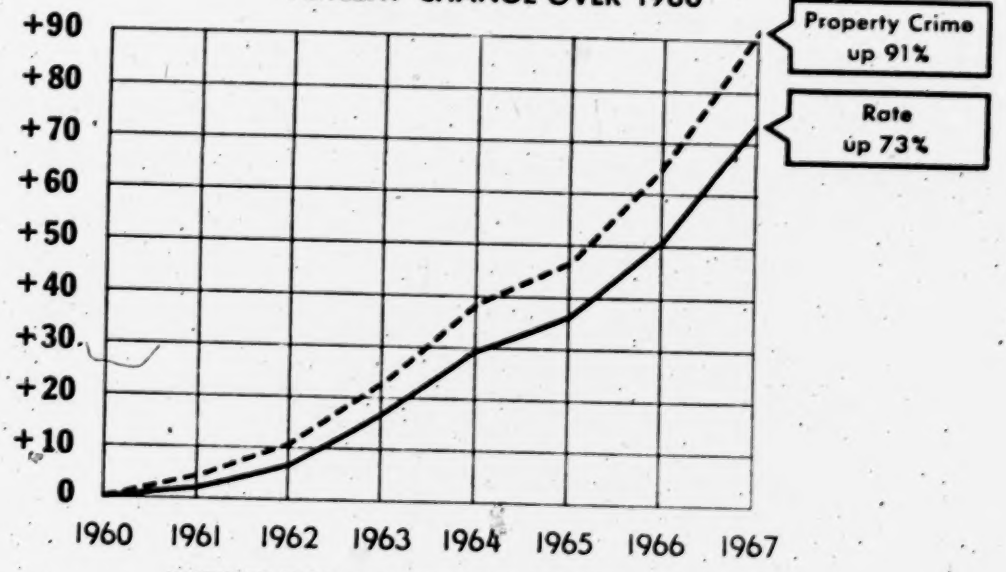
LIMITED TO MURDER, FORCIBLE RAPE, ROBBERY AND AGGRAVATED ASSAULT

FBI CHART

CRIMES AGAINST PROPERTY

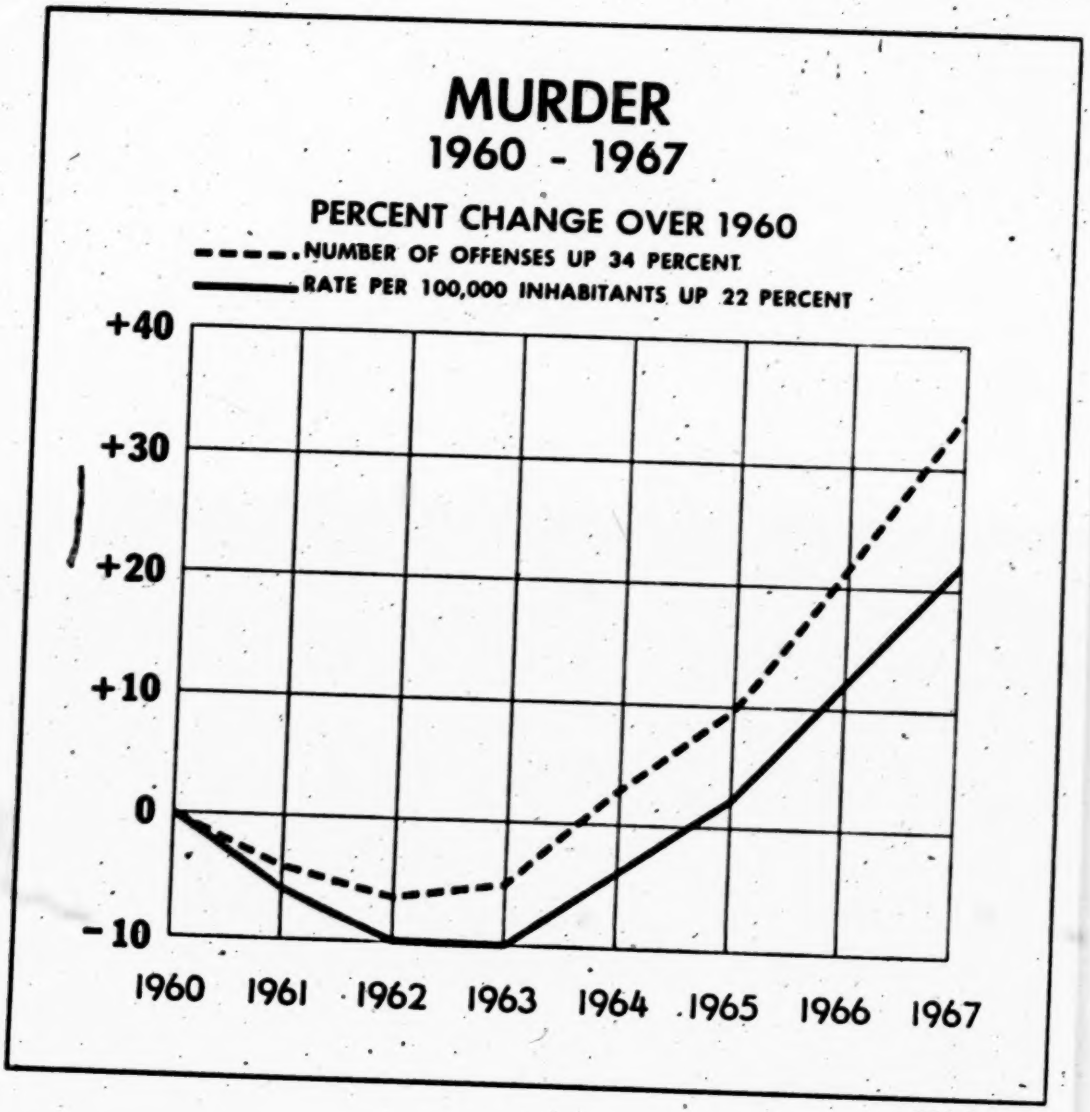
1960 - 1967

PERCENT CHANGE OVER 1960



LIMITED TO BURGLARY, LARCENY $50 AND OVER, AND AUTO THEFT

FBI CHART


MURDER
1960 - 1967
PERCENT CHANGE OVER 1960
NUMBER OF OFFENSES UP 34 PERCENT
RATE PER 100,000 INHABITANTS UP 22 PERCENT
+40
+30
+20
+10
0
-10
1960
1961
1962
1963
1964
1965
1966
1967
FBI CHART

SUPREME COURT OF THE UNITED STATES

No. 86.—October Term, 1969

Melvin Morales, Petitioner, v. State of New York	On Writ of Certiorari to the Court of Appeals of New York.

[December 8, 1969]

Per Curiam.

On October 4, 1964, a murder by stabbing took place in an elevator of an apartment building where petitioner Morales' mother lived and where Morales frequently visited. On October 13, his mother informed Morales by telephone that the police wished to talk with him; petitioner said that he would come that evening to his mother's place of business. This he did. He was apprehended by police officers and taken to the police station, arriving at 8:30 p. m. Within 15 minutes he had confessed to the crime and by 9:05 p. m. he had written and signed a statement. In response to subsequent questioning by police officers, Morales later repeated the substance of this confession. At the trial, the court held a separate hearing on the voluntariness of the confessions, found them voluntary, and admitted them over Morales' objection. Morales was convicted, the jury apparently rejecting his alibi defense that he was with his mother at the time of the murder. The Appellate Division of the New York Supreme Court affirmed without opinion. *People* v. *Morales*, 27 App. Div. 2d 904, 280 N. Y. S. 2d 520 (1967). In the New York Court of Appeals, Morales for the first time raised a Fourth Amendment issue, claiming that there was no probable cause for his detention at the time of his confessions and that the confessions, even if voluntary, were inadmissible fruits of the illegal detention. The State asserted that the issue had not been decided below and that there had hence been no opportunity to make a

record of the relevant facts; moreover, the State claimed that Morales had voluntarily surrendered himself for questioning and that in any event the voluntary confessions were the result of an independent choice by Morales such that the legality of the detention was irrelevant to the admissibility of the confessions.

The Court of Appeals affirmed, accepting without discussion the trial court's finding as to the voluntariness of Morales' confessions. *People* v. *Morales*, 22 N. Y. 2d 55, 238 N. E. 2d 307, 290 N. Y. S. 2d 898 (1968). The court dealt with and rejected the Fourth Amendment claim not on the ground that there was probable cause to arrest but rather on the ground that the police conduct involved was reasonable under the circumstances of the case. Although Morales was not free to leave at the time he was apprehended and would have been restrained had he attempted to flee, the Court of Appeals stated that his detention was not a formal arrest under New York law and that had he refused to answer questions in the police station (where he was entitled to have a lawyer if he desired one) he would have been free to leave. The Court of Appeals held that the State had authority under the Fourth Amendment to conduct brief custodial interrogation of "those persons reasonably suspected of possessing knowledge of the crime under investigation in circumstances involving crimes presenting a high degree of public concern affecting the public safety." 22 N. Y. 2d, at 65, 238 N. E. 2d, at 314, 290 N. Y. S. 2d, at 907. We granted certiorari, 394 U. S. 972 (1969).

After considering the full record, we do not disturb the determination of the trial court, affirmed by the New York appellate courts, that Morales' confessions were voluntarily given. The trial occurred prior to *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and the totality of the circumstances surrounding the confessions shows that the confessions were voluntary, not coerced.

We should not, however, decide on the record before us whether Morales' conviction should otherwise be affirmed. The ruling below, that the State may detain for custodial questioning on less than probable cause for a traditional arrest, is manifestly important, goes beyond our subsequent decisions in *Terry* v. *Ohio*, 392 U. S. 1 (1968), and *Sibron* v. *New York*, 392 U. S. 40 (1968), and is claimed by petitioner to be at odds with *Davis* v. *Mississippi*, 394 U. S. 721 (1969). But we have concluded after considering the parties' briefs and hearing oral argument that there is merit in the State's position that the record does not permit a satisfactory evaluation of the facts surrounding the apprehension and detention of Morales. A lengthy hearing was held on the question of the voluntariness of the confessions, but the basis for the apprehension of Morales does not appear to have been fully explored since no challenge to the lawfulness of the apprehension was raised until the case came to the Court of Appeals. Although that court stated that "[i]t may be conceded that the apprehending detectives did not have probable cause to justify an arrest of defendant at the time they took him into custody," 22 N. Y. 2d, at 58, 238 N. E. 2d, at 310, 290 N. Y. S. 2d, at 902, the court later said that "[t]he checkerboard square of the police investigation, although resting upon circumstantial evidence, pointed only to defendant. . . . In fact, defendant was the only person the police could have reasonably detained for questioning based upon the instant record." 22 N. Y. 2d, at 64, 238 N. E. 2d, at 313, 290 N. Y. S. 2d, at 907.

Given an opportunity to develop in an evidentiary hearing the circumstances leading to the detention of Morales and his confessions, the State may be able to show that there was probable cause for an arrest or that Morales' confrontation with the police was voluntarily undertaken by him or that the confessions were not the

product of illegal detention. In any event, in the absence of a record which squarely and necessarily presents the issue and fully illuminates the factual context in which the question arises, we choose not to grapple with the question of the legality of custodial questioning on less than probable cause for a full-fledged arrest.

We accordingly vacate the judgment below and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK dissents.